Knogo Corporation *and* Local 810, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 29-CA-6502, 29-CA-6522, 29-CA-7081, 29-CA-7207, 29-CA-7360, and 29-RC-4562

July 27, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 18, 1980, Administrative Law Judge Robert M. Schwarzbart issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and arguments in support thereof.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision[2] in light of the exceptions, arguments, and brief and has decided to affirm the rulings, findings,[3] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

We adopt the Administrative Law Judge's conclusions that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Patrick Bellucci, Jr., because he engaged in union activities, and Section 8(a)(1) of the Act by granting new economic benefits to its employees during the Union's organizing campaign in order to discourage employee support for the Union. However, we do so after analyzing the record evidence in light of our test of causation set out in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). Under the *Wright Line* test the General Counsel is first required to establish a *prima facie* case in support of the inference that an employee's protected activity was a motivating factor in the employer's decision. If such a showing is made, the burden will then shift to the employer to demonstrate that the same employer action would have taken place even in the absence of the protected conduct.[4]

With respect to the discharge of Bellucci we find that the General Counsel has established the required *prima facie* case of unlawful motivation.

The Respondent contended at the hearing that Bellucci was discharged on June 22, 1978, for failing to obtain his supervisor's permission prior to leaving work early on June 21, 1978, and for requesting that another employee punch his timecard.[5] However, the Administrative Law Judge concluded that a "principal cause" of Bellucci's discharge had been his union activities. The record shows that on June 16, 1978, during the initial stage of the Union's organizational campaign, the Respondent had observed Bellucci's meeting with Union Representative Sapenoff in the parking lot of the Respondent's plant. During a conversation immediately following this observation, Production Foreman DePietro unlawfully interrogated Bellucci with respect to whether he had signed a union authorization card, demonstrating Respondent's antiunion animus and its focus on Bellucci. During this conversation, but prior to the unlawful interrogation, Bellucci volunteered that he had met with a union organizer and believed that union representation "was a pretty good idea." Following

[1] The Respondent attached as an exhibit to its exceptions and arguments its brief to the Administrative Law Judge.

[2] We herein note four inadvertent errors of the Administrative Law Judge. First, the bargaining unit consisted of 101 employees on June 14, 1979, not 10 employees as initially stated in the Decision. Second, the record indicates that the Union had received 52 valid authorization cards as of June 14, 1979, not 53. Third, the Administrative Law Judge's conclusion with respect to Minasy's speech to Respondent's employees that his remarks impressed upon employees that they "did require a union to receive improvements in job benefits. . . ." should read "did *not* require a union." See *Tipton Electric Company, et al.*, 242 NLRB 202, 206 (1979), enfd. 621 F.2d 890 (8th Cir. 1980); and *J. M. Balter Co., Inc. d/b/a Jaison's*, 212 NLRB 1, 7-8 (1974). Fourth, under sec. B.1, of the Administrative Law Judge's Decision the date of Bellucci's discharge should read June 22, 1978, not July 22, 1978. These inadvertent errors do not affect the conclusions reached herein.

[3] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Respondent has excepted to certain findings of the Administrative Law Judge referring to statements made by Arthur Minasy, the Respondent's president, to a group of about seven employees on July 11, 1979, with respect to promises made during the Union's organizing campaign. Upon a careful review of the record, we find that there is substantial evidence in the record clearly describing the content of Minasy's references to promises of economic benefits made during a union campaign and, thus, we find that no further clarification is necessary.

The Respondent has also excepted to the Administrative Law Judge's finding that Minasy's conduct in telling the employees present at the July 11, 1979, meeting that they had been brought to meet him because they were strong union supporters was a further violation of Sec. 8(a)(1) of the Act by creating the impression of surveillance of the employees' union activities. The Respondent's exception to this finding is primarily based on the fact that the Administrative Law Judge found a violation even though such conduct was not alleged as a violation in the complaint. Inasmuch as the operative facts forming the basis for the Administrative Law Judge's finding are uncontroverted, in that Minasy admitted selecting the employees to attend the meeting based on their influence in the shop and their strong "interest in the organizing activities," and it is closely related to the subject matter of the complaint, we affirm the Administrative Law Judge's further 8(a)(1) finding with respect to Minasy's creation of an impression of surveillance. See, generally, *Ackerman Manufacturing Company*, 241 NLRB 621 (1979), and *Crown Zellerbach Corporation*, 225 NLRB 911 (1976).

[4] See, generally, *Wright Line, supra* at 1089.

[5] The record shows that Bellucci was hired in September 1977 and was considered by the Respondent to be a satisfactory employee. The Respondent conceded that Bellucci's attendance and punctuality were not factors in the discharge decisions.

this encounter with DePietro, Bellucci distributed union pamphlets and authorization cards to other employees during his coffee and lunch breaks and during worktime. Less than 1 week later, without warning or the invoking of its policy of progressive disciplinary action, the Respondent discharged Bellucci. We find that the General Counsel has clearly demonstrated that Bellucci's activities on behalf of the Union were motivating factors of Respondent's decision to discharge Bellucci on June 22, 1978. Accordingly, the General Counsel's *prima facie* case of unlawful motivation shifts to the Respondent the burden of showing that Bellucci would have been discharged even in the absence of his protected union activity.

The record indicates that, on the day before his discharge, Bellucci became ill while in the Respondent's parking lot during his lunch break and immediately left the premises. Bellucci did not inform the Respondent of his illness, and requested that a coworker punch out his timecard.[6] DePietro testified that Bellucci was discharged for failing to obtain permission prior to leaving work early and for failing to punch his own timecard. The Administrative Law Judge found that, on June 22, 1978, prior to the conversation between Bellucci and DePietro that resulted in Bellucci's discharge, DePietro was unaware that Bellucci's timecard had been punched out by another employee. However, the record shows through Bellucci's credited testimony that Bellucci's toolbox was at DePietro's desk prior to the conversation. Thus, it is evident that the Respondent's decision to discharge Bellucci was made prior to the time the Respondent learned of Bellucci's violation of the policy requiring each employee to punch only his own timecard. Thus, the Respondent's argument with respect to the reasons for Bellucci's discharge is reduced to Bellucci's failure to secure the Respondent's permission before leaving work early on June 21, 1978.

In finding unlawful motivation in the Respondent's discharge of Bellucci, the Administrative Law Judge relies, *inter alia*, on the disparate disciplinary treatment afforded Bellucci; the Respondent's departure from its policy of progressive discipline with respect to Bellucci's discharge; and the Respondent's failure to enforce strictly all aspects of its timeclock policies.

The Respondent offered no evidence to show that other employees who failed to obtain permission before leaving work early were similarly discharged.[7] Even assuming, *arguendo*, that the Respondent's decision to discharge Bellucci was based in part on Bellucci's failure to punch his own timecard, the Respondent produced no evidence to explain its departure from its established policy of progressive discipline. The Administrative Law Judge found that, under this policy, employees are not discharged for their first offense but customarily are spoken to several times by their supervisors before action is taken. We conclude, therefore, that the Respondent has failed to demonstrate that it would have discharged Bellucci for his failing to obtain permission before leaving work early and, additionally, for having a coworker punch out his timecard on one occasion, even in the absence of his protected union activities. We affirm the Administrative Law Judge's finding that the Respondent violated Section 8(a)(3) of the Act by its discharge of Bellucci on June 22, 1978.

We further find that the General Counsel has presented a *prima facie* case of 8(a)(1) interference and coercion with respect to the Respondent's granting of new economic benefits[8] to its employees during the Union's organizational campaign in order to discourage employee support for the Union.

The Respondent contended at the hearing that it granted a new economic benefits package on March 9, 1979, in order to counter a longstanding company problem with respect to difficulties with attracting and retaining competent employees. The Administrative Law Judge found that the Respondent's grant of new economic benefits in the context of the Union's campaign was not a part of a regularly scheduled or periodic review by the Respondent of terms and conditions of employment, but were granted "at least in part" to counter the Union's campaign.

The record provides ample evidence in support of the Administrative Law Judge's finding that the Respondent knew of the ongoing nature of the Union's organizational campaign at the time when work on the new benefits package began in December 1978, and when the benefits were ultimately granted to the employees in March 1979. Michael Trentacosti, director of operations of the Respondent, testified that the pace of the Union's organizational campaign had slowed during September, October, and November 1978, but that during December 1978 he was aware of increased union activity at the plant. Further, in December 1978, Trentacosti was advised by a member of the corporate consulting firm retained by the Respondent to

[6] It is noted that Bellucci accrued no increased hours, wages, or benefits of any kind through his failure to punch out his own timecard.

[7] The record shows that the Respondent had not discharged two other employees despite their absences, lateness, or early departures on 15 separate occasions during a 2-month period. The Respondent later validly discharged one of these employees following another absence and a consistently poor general work record.

[8] The new economic benefits consisted of an additional paid holiday, paid sick leave, jury duty, and bereavement pay.

design the benefits package that the Respondent must refrain from granting new benefits or changing policies in light of the Union's organizing activities. Work on the new benefits package began approximately 1 month after the conclusion of the initial hearing before the Administrative Law Judge in the instant case.

The record demonstrates the Respondent's continued awareness of the Union's organizing activity in February 1979, through its receipt of a union pamphlet wherein the Union claimed the majority support of the Respondent's employees. Thereafter, the Respondent filed a petition for an election which on February 15, 1979, was dismissed by the Regional Director since "no question concerning representation . . ." existed at that time. Accordingly, the record clearly demonstrates that the Respondent was keenly aware of the Union's continuing organizational efforts prior to, during, and after the time when the new ecomomic benefits package was designed and implemented. Thus, the General Counsel's *prima facie* case of wrongful interference and coercion shifts to the Respondent the burden of showing that the new economic benefits would have been granted even if the Union had not been in the picture.

The Respondent argued, in substance, that it implemented the new benefits due to its high rate of employee turnover and its noncompetitive standing in the industry with respect to employee fringe benefits. The record is devoid of documentary or direct evidence of any kind in support of the Respondent's argument that lawful economic considerations were motivating factors behind its decision to grant new economic benefits. The Respondent's director of operations, Trentacosti, provided no documentary evidence and was unable to testify as to the Respondent's turnover rate in the years preceding 1978; and he testified that, at least in 1977, the Respondent was unconcerned about the employee turnover rate due to a decline in business. Furthermore, the Respondent provided no documentary evidence with respect to the timing and substance of its initial meetings with the management consulting firm contacted to design the new economic benefits package. We therefore conclude that the Respondent has failed to meet its burden by sustaining its asserted economic defense, and we therefore affirm the Administrative Law Judge's conclusion that the Respondent violated Section 8(a)(1) of the Act on March 9, 1979.[9]

[9] See *N.L.R.B.* v. *Exchange Parts Company*, 375 U.S. 405 (1964), which the Administrative Law Judge properly relied upon.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Knogo Corporation, Hicksville, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

IT IS FURTHER ORDERED that the election in Case 29-RC-4562 be set aside and the petition in that matter be, and it hereby is, dismissed.

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge: These consolidated cases were heard in Plainview and Brooklyn, New York, pursuant to charges filed by Local 810, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein the Union or the Petitioner. The complaints, as joined, allege that Knogo Corporation, herein called the Respondent or the Employer, violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, herein called the Act.[1] The Respondent, in its answers to the various complaints, denies commission of unfair labor practices.

Pursuant to a Decision and Direction of Election issued by the Regional Director on June 12, 1979, an election by secret ballot was conducted on July 20, 1979, among Respondent's production, maintenance, and other shop employees. The tally of ballots served on the parties immediately following the election showed that, of approximately 110 eligible voters, 104 cast ballots, of which 1 ballot was void, 21 were cast for the Union, 68 were cast against the Union, and 14 ballots were challenged. The challenged ballots were not sufficient in number to affect the results of the election. On July 24, the Union filed timely objections to conduct affecting the results of the election, alleged to have occurred in the

[1] The docket entries are as follows:
The charges in Cases 29-CA-6502 and 29-CA-6522 were filed on June 29 and July 12, 1978, respectively. Consolidated complaint thereon issued on August 30, and the hearing was conducted in Plainview on November 1-3, and in Brooklyn on November 20-21, 1978. On November 21, the hearing was closed. Thereafter, I granted a series of motions by the General Counsel that the hearing be reopened so that certain subsequently issued complaints, arising serially, involving the same parties and union organizational campaign, be further consolidated for hearing with the earlier cases. The first matter to be further consolidated was Case 29-CA-7081, pursuant to a charge filed March 14, 1979, and a complaint issued April 25, 1979. Also joined thereafter by separate orders were Cases 29-CA-7202 and 29-CA-7360, where the charges were filed, respectively, on May 21 and July 24, 1979, and complaints issued on June 25 and September 14. The reopened hearing on the subsequently consolidated complaints was held on October 15-19 and December 3, 1979.

critical period before the election.[2] These objections will be considered later.[3]

Issues

1. Whether the Respondent violated Section 8(a)(1) of the Act by:

(a) Coercively interrogating its employees concerning their union membership, activities, and sympathies.

(b) Threatening its employees with discharge and other reprisals if they became or remained union members, or if they assisted and supported the Union.

(c) Withholding and refusing to grant its employees increased holidays, sick leave, jury duty pay, bereavement pay, and other increased benefits and improvements in their working conditions to induce them to abandon their support for and membership in the Union.

(d) By offering and granting to employees the above-described benefits to induce them to abandon their support for and membership in the Union.

(e) Causing to be erected a fence enclosing the employee parking lot and thereafter promulgating and enforcing a discriminatory no-access rule barring union representatives from access to the Respondent's employees in the employee parking lot, while permitting other nonemployees to have such access.

(f) Singling out employees because of their known union membership or activities for private meetings with management to dissuade them from continuing their support for the Union.

(g) Soliciting employee grievances to discourage support for the Union.

(h) Informing employees that the Respondent cannot grant additional benefits to employees because of the Union's organizational activities.

(i) Keeping under surveillance the meeting places and activities of the Union and the concerted activities of its employees.

2. Whether the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Patrick Bellucci, Helen Manning, and Linda Covais because they signed authorization cards for and otherwise were active on behalf of the Union.

3. Whether the election in Case 29-RC-4562 should be set aside and either a new election directed or that the Respondent be required to recognize and bargain with the Union in accordance with Section 8(a)(5) and (1) of the Act.

All parties were given a full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Briefs filed by the Respondent have been carefully considered. The General Counsel did not submit a brief.

Upon the entire record of the case and my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a New York corporation, is engaged in the manufacture, sale, and distribution of electronic antishoplifting devices and related products at its office and place of business in Hicksville, New York. During its fiscal year preceding the issuance of complaint herein, a representative period, the Respondent in the course and conduct of its business purchased and caused to be transported and delivered to its place of business goods, supplies, and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its Hicksville plant in interstate commerce directly from States of the United States other than the State of New York.

Upon the foregoing conceded facts, I find that the Respondent is an employer engaged in comnerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The answer admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent manufactures electronic antishoplifting devices at its plant in Hicksville, New York.[4] At the time of the events herein, Arthur J. Minasy was Respondent's president and chief executive officer. Michael Trentacosti was director of operations, Paul Montalbano, plant manager; and Michael DePietro, a production foreman.[5]

The Union, principally through the efforts of Field Representative David Sapenoff, began its organizational campaign among the Respondent's employees in mid-June 1978. Sapenoff, during the first 11 months of the campaign, approached many of the Respondent's employees, during lunchtime and breaktimes, in the employees' parking lot to the rear of the Respondent's premises and by situating himself near the driveway leading to the rear lot. There, he gave out literature and union cards to employees as they left work. The erection by the Respondent of a guarded fence enclosing the rear lot about 11 months after the Union's campaign began, but while it was still in progress, is one of the issues in this proceeding.

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[2] In *Goodyear Tire and Rubber Company*, 138 NLRB 453 (1962), the Board defined the critical period before an election as the interval from the date of the filing of the petition to the time of the election. Conduct occurring during this period found to have interfered with the employees' freedom of choice at the polls may be grounds for setting aside the election.

[3] Absent exceptions to the Regional Director's supplemental decision, on October 3, 1979, it was ordered that the objections to the election in Case 29-RC-4562, as defined in the Regional Director's supplemental decision, be consolidated for hearing with Case 29-CA-7360 and the other complaint cases referred to herein. The Regional Director, in his supplemental decision, had overruled Objections 5 and 6 and had found that Objections 1-4 be consolidated for hearing.

[4] These devices, which include wafers to be attached to garments and strips placed inside books, emit a signal when the protected items are improperly removed from the store or library.

[5] The status of Keith Minasy, son of the Respondent's president, as a supervisor or agent of the Company is in dispute and will be considered below.

The Union's campaign continued from about June 16, 1978, to the election of July 20, 1979, with certain break periods. When the organizational drive began, there were approximately 75 employees in the unit, which figure increased to 10 employees by June 14, 1979, when the Union claims it achieved majority support.

B. *The Discharges and Related Interference—Facts*

1. Patrick Bellucci, Jr.

The General Counsel contends that Bellucci[6] was terminated on July 22, 1978, because he signed a union authorization card and had been active in the Union's organizational campaign. In support of this position, the General Counsel asserts that Bellucci had been observed by supervisors in conversation with the union organizer and had been interrogated in connection therewith. The Respondent asserts that Bellucci was fired for having gone home early on the day before his termination without first informing and obtaining the consent of his supervisor and by requesting that another employee punch his card when he left, all in violation of the Respondent's posted policies. Bellucci's work performance, attendance, and punctuality played no role in the Respondent's decision to dismiss him.

Bellucci testified that at midday on June 16, 1978, while he and coworker Paul Vigliotti vere seated in the latter's car having lunch,[7] they were approached by union representative Sapenoff. Sapenoff introduced himself as a Local 810, Teamsters, organizer and asked about existing employee benefits. During their 15-minute talk, Sapenoff gave each of the men union literature and an authorization card. Bellucci related that, during the last 5 minutes of this conversation, he noticed that his supervisor, Production Foreman DePietro, was standing in the vicinity of the employees' entrance, which opened onto the parking lot, watching them.[8] The rear entrance was approximately 100 feet from where Vigliotti's car was parked.

As Bellucci and Vigliotti reentered the plant through the rear doorway, DePietro walked in ahead of them. Vigliotti went toward his work station, but Bellucci remained near the door to talk to DePietro. Bellucci volunteered that he had been talking with someone from the Union who had given him a pamphlet and that he thought that the Union was a pretty good idea. While saying this, Bellucci noticed that DePietro had an authorization card and union leaflet on his desk. DePietro replied that there are good points and bad points in the Union and asked if Bellucci had signed a union authorization card. Bellucci said that he had not. The bell then rang and Bellucci returned to work.

During their lunch break on June 19, Bellucci, Vigliotti, and another employee signed union cards in Vigliotti's car, parked in the employees' parking lot. These cards were then given to Sapenoff who, in turn, gave Bellucci a supply of union cards and leaflets to distribute among the employees.

In the days that followed, Bellucci did speak to other employees about the benefits of belonging to the Union, requesting that they sign the cards. He did this during worktime in various places in the plant, but, although sent back to his work area, is not certain that these activities were specifically observed by a company official.

Bellucci related that, during the morning break of June 21, he bought something to eat from the food truck that came daily to the rear entrance. When the 10-minute recess ended, Bellucci returned to the plant and worked until the noon lunchtime. He then again bought food from the truck which he brought to his car where he had lunch with Vigliotti. During this lunch recess, Bellucci experienced stomach cramps. He asked Vigliotti to tell DePietro or Instructor Harry Lane that he was going home, and also asked Vigliotti to punch his timecard. Bellucci then left. At the hearing, Bellucci explained that he was not in condition to return to the plant and did not personally attempt to punch out.[9] Vigliotti punched Bellucci's card at 12:29 p.m.

On the next day, Thursday, June 22, Bellucci punched in on time and went to his work station. Just as he sat down, DePietro approached and stated that he wanted to talk to him. Bellucci followed DePietro to the latter's desk, where he noticed both his toolbox and a check. DePietro told Bellucci that he had to let him go because he had not directly informed DePietro that he was leaving. When Bellucci replied that he had been sick, DePietro stated that the Company had been good to him and had given him promotions, and that Bellucci should not have done something. Bellucci could not recall exactly what else was said except that DePietro did not want to discuss the matter further. Bellucci then took his check and toolbox and went home.

Since leaving the Company, Bellucci has returned to continue to solicit support for the Union. For these services, rendered after his discharge, the Union has compensated him. However, Bellucci was not paid by the Union for his organizing activities before discharge.[10]

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[6] Bellucci, hired by the Respondent on September 12, 1977, worked as an assembler in the electromechanical department under Production Foreman Michael DePietro. Bellucci originally was assigned to wiring and soldering, but after about 8 months, DePietro advanced him to the laminating machine, used by the Respondent in the manufacture of library strips. These strips, unless desensitized by the librarian, signal unauthorized removal. While with the Respondent, Bellucci received two hourly pay raises of 25 cents each. The first increment was given about 6 months after his date of hire and the second raise, also announced by DePietro, was afforded approximately 1 month after he began work at the laminating machine.

[7] Vigliotti's car was then parked in the employees' parking lot to the rear of the Respondent's principal plant building.

[8] Sapenoff, who earlier had worked for the Respondent and could identify members of management and supervision, testified that on that occasion he saw both DePietro and Michael Trentacosti, the Respondent's director of operations, observing them from that doorway. As Sapenoff began his organizational campaign on June 16, Bellucci and Vigliotti were among the first employees to be approached.

[9] After leaving the Respondent's premises, Bellucci drove himself home, a journey of about 20 to 30 minutes. Although he had made an appointment to see a physician at 6 that evening, by the time of the appointment, he felt better and did not go. He did not seek other medical assistance.

[10] On cross-examination, Bellucci corrected his original testimony and averred that Friday, rather than Thursday, was the regular payday, putting in question whether he actually received a check on Thursday, June 22, when notified by DePietro of his discharge. The Respondent's paychecks are prepared by a computer for Friday distribution. While this does represent an inconsistency in Bellucci's testimony in assessing his

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DePietro testified that, on the morning of June 21, he transferred Bellucci from the laminating machine to assist in the wiring department where Bellucci worked with Instructor Harry Lane. After lunch that day, Lane asked what had happened to Bellucci, who could not be found. DePietro replied that he did not know and checked to see if Bellucci's card had been punched out. Lane returned and told DePietro that he had spoken to Vigliotti, who usually left work with Bellucci. Vigliotti reported that Bellucci had become ill and had decided to go home during the lunch period.

When Bellucci returned to work the next morning, DePietro asked why he had left work without permission. Bellucci replied that he had not felt well at lunchtime and decided to go home. When DePietro asked why he had not come in and told him and had not punched out. Bellucci answered that he had someone else punch his timecard. DePietro, declaring that it was a violation to have someone else punch his card, asked who had done so for him. When Bellucci replied that he did not have to answer this, DePietro announced that, under those conditions, he would terminate Bellucci right then. Bellucci picked up his toolbox and left the plant almost immediately.

DePietro denied knowing of Bellucci's union activities, denied having seen Bellucci speak to Sapenoff or any other union representative, denied having asked if Bellucci had signed a card, denied having observed Bellucci talking about the Union to other employees in the plant, and even denied having had a copy of the union handbill and authorization card on his desk on June 16, as related to by Bellucci. As noted, DePietro asserted that Bellucci was terminated for breaching the Company's posted policies requiring that employees obtain permission from their supervisors before leaving work early and that each employee may punch only his own card. DePietro explained that the timeclock and his desk were both near the rear employees' entrance and that, had Bellucci followed these policies, he would have had easy access to both DePietro and the clock.

DePietro and Plant Manager Paul Montalbano explained that, while there was no employee handbook at the time, company policies were made known by a series of notices posted on an area surrounding the timeclock. Here, official notices put out by the Company and notices relevant to state and Federal laws were posted. A second posting area, a bulletin board in the employees' cafeteria, generally carried unofficial notices, such as news of forthcoming softball games, social events, and items and services for sale.

The Respondent's timeclock policy basically was set forth in three notices posted by the timeclock since their respective dates of issuance. The first such notice, dated February 15, 1974, provides:

> All plant personnel must punch out a card if and when going out of the building for lunch. This is a requirement that must be followed through.

A second notice, dated September 7, 1976, is as follows:

> It is important that each employee punch their own time card. Punching another employee's time card, or in any way altering your own or another employee's time card will result in dismissal. If your time card is incorrect take it to your supervisor immediately.

Another memorandum, dated July 1, 1976, also near the timeclock, set forth the daily work schedules for the various departments and provided, in part, that "Anyone leaving the Knogo premises during scheduled lunch time, other than going to the truck canteen, must punch their card upon leaving and upon returning."[11]

DePietro generally confirmed Bellucci's account of the terminal interview of June 22, except that, contrary to Bellucci, DePietro did not testify that he had told Bellucci that the Company had been good to him and that Bellucci should not have taken certain action.

Although the General Counsel finds a conflict between the notice that flatly required employees to punch out whenever they left the building and the notice that permitted employees to leave the building during lunch time to go to the truck canteen without punching out, the Respondent's witnesses explain that the rule is interpreted to enable employees to leave the building during breaktimes and lunchtimes without punching out only if they go to the food truck canteen in the employees' rear parking lot. However, employees who leave the Company's premises to take lunch at outside restaurants are required to punch out. Under no circumstances are any employees permitted to punch any card but their own.[12]

2. Linda Covais and Helen Manning

The General Counsel contends that Covais and Manning[13] were terminated because they had been seen by

credibility, contrary to the Respondent, I do not consider it to be of particular significance. In accordance with the testimony of DePietro and other witnesses, I find that Bellucci was not paid until a later time.

[11] Much testimony was adduced at the hearing as to whether, as contended by the Respondent, the notices relating to Respondent's timeclock policy and certain other notices concerning additional company work rules and government regulations, in fact, had been conspicuously displayed by the clock while Bellucci was employed. Although Bellucci and the other alleged discriminatees, Linda Covais and Helen Manning, testified that they had not seen such notices while with the Respondent, their denials in this area are not credited as they had made no effort to read materials posted in the plant, except that they occasionally checked, looked at the cafeteria bulletin board to learn of any scheduled social events. Accordingly, they are not in position to know whether the notices, in fact, had been posted. It, therefore, is found that the notices concerning the Respondent's timecard policies and other official notices were posted by the timeclock while Bellucci was employed. Although Bellucci testified that he had not been informed of the Respondent's work rules when hired and had not been told to read posted notices, DePietro credibly related that he regularly oriented new employees, including Bellucci, about the Respondent's work rules and directed them to read what had been posted. Having found that these notices had been conspicuously posted, their presence obviously served a purpose. Even though Bellucci declined to read them, he nonetheless is chargeable with knowledge of their content.

[12] Bellucci, Covais, and Manning testified that, contrary to this policy, they frequently saw a former production employee, while still within the Respondent, often punch out the cards of as many as eight other employees. Although DePietro's desk was near the timeclock, he and other management witnesses denied knowledge of this.

[13] At the time of the hearing, Covais and Manning were 18 and 16 years of age, respectively.

supervisors in discussion with union representatives and had signed union cards, and that their discharges had followed a threat to fire them because of their union activities. The Respondent denies knowledge of any union connection and contends that Covais was terminated for poor work and an unfavorable attitude and that Manning was not discharged but had quit when Covais was fired. Although Manning shared Covais' poor record for attendance and punctuality, the Respondent asserts that Manning, unlike Covais, had been an excellent worker, but had refused its invitation to remain on the job. The General Counsel counterargues that Manning had been constructively discharged when Covais was terminated as she had traveled to and from work each day in Covais' car and was thus deprived of her sole means of transportation.

Covais and Manning, good friends for about 8 years at the time of the hearing, were both hired by the Respondent on May 1, 1978, as production workers. They lived one block apart in Hicksville, where the Respondent's plant is located, and, as noted, traveled to work together each day in Covais' automobile.[14]

On Friday, June 23, 1978, Covais and Manning, although physically well, did not report to work and did not call in. However, they did go to the plant at around noon, asking Supervisor DePietro for their paychecks as they had to go to Rhode Island.[15] DePietro asked them to wait while he notified Plant Manager Montalbano, suggesting that they speak to him. DePietro related that he then told Montalbano that Covais and Manning had come in just for their pay and were going to Rhode Island. DePietro asked Montalbano to take care of them because he would not even pay them, giving Montalbano their checks.[16]

Montalbano called Manning and Covais into his office, where he told them that they had been taking too many days off and coming in late too many times. He told them about the importance of being at work every day and performing at their stations to keep the assembly line going. They had a function on the assembly line and had to be there each day for the line to function. Covais replied that they did not care. They had to go to Rhode Island that day come heck or high water, even if it meant that they were fired.[17] Montalbano told them that he, too, had been young, had wanted to take days off, would have liked to be in Rhode Island, and, perhaps, could understand the way they felt. However, he reiterated the importance of the line, the Respondent's inability to tolerate what they were doing, advised them that DePietro had wanted to let Covais go, and asked if they were really serious about their jobs. When both affirmed that they really wanted and needed their jobs, Montalbano declared that he really should terminate them then for what they were doing, but agreed to give them one more chance. Both agreed they would be on time the next Monday, ready to work.[18]

After receiving their checks and leaving Montalbano's office, Covais and Manning went to the rear parking lot to wait for other employees to come out for lunch. There, they were approached by Patrick Bellucci who informed them that he had been fired for having taken a half day off. Manning and Covais replied that they could not believe this because they had just been talking about the same thing in Montalbano's office, and that, although Montalbano had reprimanded them for taking too many days off and coming in late, he would give them another chance. Covais and Manning then agreed to Bellucci's request that they sign union cards, but did not actually do so until several days later.[19]

Manning and Covais returned to work on Monday, June 26. While they were having lunch that day, leaning against Covais' car in the rear parking lot, Sapenoff approached and spoke to them about the Union. As they talked, Covais and Manning saw DePietro, Trentacosti, and Instructor Lane watching them from outside the employees' entrance, at a distance estimated as approximately the width of seven parking lot spaces. These Company representatives observed about half of the 10-minute conversation with Sapenoff. When it ended, Covais and Manning returned to the building through the employee entrance, walking in past DePietro, Trentacosti, and Lane, who continued to stand outside the doorway.

Manning and Covais testified that they frequently brought their lunch at a nearby delicatessen off the Respondent's premises, driving there at noon,[20] then they would return to the rear parking lot to eat by their car. While coming back to the parking lot at midday on June 27, again in Covais' car, they were stopped at the lot entrance by Sapenoff and Bellucci who asked if they were going to the union meeting scheduled for the next evening. As Covais and Manning, seated in their car, talked with the union representatives, they saw Plant Manager Montalbano drive by with another company official, believed to have been Trentacosti. They related that Montalbano smiled at them as he went by.[21]

Later during that lunch recess, while parked in the lot, Covais and Manning both signed the union cards left earlier in the glove compartment.

Covais related that when on June 28, DePietro asked if she planned to work the following week, which in-

[14] Covais and Manning also had worked together at prior places of employment where, again, Covais or her brother had provided Manning with transportation to work.

[15] Paychecks were customarily distributed by DePietro.

[16] As will be discussed, DePietro had been dissatisfied with Covais and Manning for other reasons, as well.

[17] Covais explained that they had taken the day off because they were going to Rhode Island for a social event and had to be there early the next morning. Although she estimated that this trip would take them 3 hours, they did not work at all that Friday.

[18] The foregoing is a synthesis of the testimony of Montalbano, Covais, Manning, and DePietro. The General Counsel contends that the warnings and threat of discharge given by Montalbano during this interview was unlawful.

[19] Covais related that she first was approached by Bellucci about the Union on or around June 19, while at work in the plant. On that occasion, he asked if she had signed a union card. When she said she had not, they talked about what the Union could do to improve existing job benefits. However, there is no evidence that any company official had observed this conversation.

[20] Corroborating Bellucci's testimony that the Respondent's asserted timeclock policy was loosely enforced, Covais and Manning related that, after their first week with the Respondent, they did not punch out when leaving the premises at noon to drive to the delicatessen.

[21] Montalbano denied having seen Manning or Covais talking to Sapenoff.

cluded the Fourth of July holiday,[22] she replied that she intended to take that week off. DePietro denies having asked her this.

Covais testified that at or about 4:25 p.m. on June 28, as the day was ending, she asked Brian Robins[23] for a green sheet, a form used by employees to record their daily production. Robins replied that Montalbano wanted to see her. Telling Manning where she was going, Covais went to Montalbano's office. Montalbano told Covais that he would have to let her go because she went to the bathroom too often. Covais replied that she only went twice a day. Montalbano declared that he had been told by DePietro that she was in and out of the bathroom all day long. At that point, Manning entered the office and asked if Covais had gotten her green sheet.[24] Covais stated that she would not be needing one anymore. When Manning asked why, Covais replied because she went "too much pee-pee." Both girls started to laugh. Covais asked what Montalbano was going to do with Manning as she provided her ride. Montalbano asked Manning if she could come to work. When Manning replied that she did not know, Montalbano told her that if she was in, she was in, if she was not, she was not. Covais testified that Montalbano did not tell Manning that she, too, was fired.

Manning's account of this incident was significantly inconsistent with that of Covais[25] Manning related that, when she entered Montalbano's office with the green sheets, Covais was there. After Covais had told her, as above described, that she had been fired and they had had their laugh, Covais then asked Montalbano what he was going to do about Manning because she gave Manning her ride to and from work. Montalbano asked if Manning would still be able to come in. Manning, however, contrary to Covais, related that she had answered affirmatively, that she probably would be able to get a ride from her mother, who passed that way. Montalbano then replied that he was sorry he had to let Manning go. As Manning and Covais were leaving his office, Montalbano stated that they "should not have done that." When Manning turned and asked, "Done what?" Montalbano did not answer. They then left.

At 5 p.m. that day, Manning and Covais attended a union meeting at a nearby bar and grill. As they arrived, they saw Montalbano walking from the area where the union meeting was being held toward the bar. Manning and Covais joined the meeting already in progress. There were about 15 or 16 people present. They heard Sapenoff state that, without a union, employees could be fired for no reason. Covais announced that she had been fired for going to the bathroom too much and Manning declared that, without Covais, she could not get her ride to work. Thereafter, a charge was filed by the Union on their behalf.

Montalbano testified that Manning was not discharged, but merely had decided not to continue on with the Respondent after he terminated Covais. While both employees had poor records for attendance and punctuality,[26] Manning was an excellent worker, while Covais consistently had been a poor employee with a lackadaisical attitude. Montalbano had received a number of complaints concerning both girls from DePietro and maintenance man Robins.

Early in the afternoon of June 28, Robins had told Montalbano that he was very upset with Covais as she was constantly in the ladies' room that day. He recommended that Montalbano let her go; she was not going to make her production quota if she was going to spend that much time in the ladies' room. Montalbano agreed to terminate her and, at or about 3:30 p.m. that day, summoned Covais to his office. There, Montalbano told her that he had some unpleasant news. After talking to supervision and reviewing her performance, Montalbano did not feel that Covais could "cut it" and he would have to let her go that afternoon. Montalbano referred to the need to speak to her several times in the past about her latenesses, her excessive days off, and her unchangeably indifferent performance and attitude. Montalbano also stated that she had been spending too much time in the ladies' room. He repeated that he would have to let her go. When Covais asked if this meant that she were being fired, Montalbano said that it did. At that point, Manning came in and asked if Covais needed a green sheet. Covais replied that she would not be needing the green sheet as she would not be coming in the next day. Both returned to their stations to complete the day's work.

According to Montalbano, about 5 minutes later, Manning beckoned to him in the production area, and announced that as Covais was being fired, she had no ride or other means of getting to the plant. Montalbano replied that Manning was an excellent worker, was doing very well, and he urged her to try to find other means of transportation as the Company really wanted to have her there. Should she come to work the next morning, the job would be hers. Manning did not respond, but did not thereafter return to work.

Montalbano, DePietro, and Robins testified as to the disciplinary recommendations made to Montalbano before action was taken. During the last 2 weeks of their employment, Robins had complained twice to DePietro and Montalbano about Covais' work and habits. He first told DePietro about 2 weeks before Covais' termination that Covais was not sufficiently fast on the machine where she was then assigned and that he could not

[22] Although the plant is closed for summer recess during the Fourth of July week, the Company allows employees to work that week if they have not yet accrued sufficient service to qualify for a vacation.

[23] Robins was a maintenance mechanic who also distributed work and parts to employees in the plant area where Covais and Manning were assigned. He had responsibility to ensure that the daily production quotas be met in his area.

[24] Each day Manning collected the green sheets from the employees in her area and brought them to Montalbano's office.

[25] Manning was sequestered during Covais' testimony.

[26] The record reveals that during their time with the Respondent, from May 1 to June 28, Manning and Covais, traveling together, were both absent on 5 days, had one partial absence in that they left work on May 26 at 11:21 a.m., and were late seven times. The last three latenesses came on June 16, 22, and 27, when they were late, respectively, by 41, 11, and 32 minutes.

obtain the required daily production quota, for which he was responsible.[27]

DePietro had suggested that Robins discuss this with Montalbano as he already had mentioned Covais to him several times and had gotten nowhere.

Accordingly, Robins also repeated his complaints concerning Covais to Montalbano later that day. Montalbano acknowledged that he had tried Covais at various jobs in the plant and could not keep her satisfied; she seemed bored. However, Montalbano expressed an intent to try her out a bit longer to see if she would improve. If it later was decided that Covais could not keep up on the penny wafer machine, where she was then assigned, she would be placed at the welding machine which has no established production quota.[28]

Approximately 1 week later, on or about June 21, with DePietro's approval, Robins moved Covais to the welding machine. On June 28, Robins, as noted, reported to Montalbano that Covais still was doing the same thing. The other ladies employed were becoming aggravated because they sat and did their work while Covais repeatedly got up and left her machine. As Covais was not working out, he suggested that she be fired. It was their second conversation that week concerning Covais' performance and finally prompted her discharge by Montalbano.

Robins testified that Covais' work on the penny wafer machine required that she take a previously processed piece from a box next to her, place it on the machine, and push two palm buttons to complete the item. Three employees were assigned to each of the Respondent's two penny wafer machines, which run on automatic cycles. For her machine to function it was necessary for Covais to push her buttons at the same time as another employee at a different part of the machine did the same. If the two sets of buttons were not pressed at the same time, the machine would not function. Therefore, when Covais absented herself, Robin had to replace her in coordinately pushing the buttons. The work was repetitive and the daily quota for each such machine was 5,000 wafers.

With less than 2 months with the Respondent, Covais, in order to find her a place, was assigned to about seven different jobs in the wafer section—all routinely manual—while Manning performed satisfactorily in her original assignment and was not moved about.

DePietro testified that in late May, before their pay raise was granted, he had urged Montalbano to fire Manning and Covais because of their latenesses, absenteeism, and early departure. He also had suggested that as Covais could not do the work, Montalbano would discharge her for that reason as well. Montalbano, however, had overruled DePietro on the ground that Manning and Covais were young kids and opined that, perhaps, by giving them raises, both might find additional incentive and Covais might become more productive. Accordingly, he gave Covais a 15-cent hourly raise at the beginning of June, while simultaneously giving the more highly regarded Manning a 25-cent increment.

DePietro, therefore, had been particularly incensed when on June 23 Manning and Covais took the day off without approval to go to Rhode Island, coming to the plant at midday only to collect their paychecks, and had recommended again that Montalbano discharge them.

The Respondent's contention that only Covais was dismissed is corroborated by contemporaneously made entries on their timecards. Covais' card for the pay period ending Tuesday, July 4, bore a notation that she was terminated on Wednesday, June 28, while Manning's card for that period contained the dual notations, "Do not remove card" and "Quit job." DePietro explained that Manning's card had been kept in the rack for the week following June 28, the first day of the pay period, and it was only after she had failed to return to the plant that, at the start of the next pay week, he had written on Manning's card that she had quit.[29]

C. *The Discharges and Related Interference—Discussion and Findings*

1. Covais and Manning

On the record of this proceeding, I do not credit the testimony of Covais and Manning. Separated at the hearing, the respective accounts of their June 28 interview with Montalbano were contradictory in at least three material respects. First, although Covais testified that only she, and not Manning, was fired on that occasion, Manning related that she, too, had been specifically dismissed. Also, while Covais related that she had asked Montalbano what would become of Manning when she lost her only means of getting to work each day, Manning testified that she had told Montalbano that, without Covais, her mother could drive her to work. Finally, as they left Montalbano's office, only Manning testified to having heard the plant manager say that "they should not have done that" a statement Manning questioned him about.

The record is clear that, during the less than 2 months of their employment by the Respondent, they had been treated with every consideration, although on 15 separate occasions they either had been absent, late, or gone home early, and although Covais' work performance was consistently poor. To try to place Covais during her less than 2 months with the Respondent, she was moved to seven different unskilled jobs in the wafer assembly area, all without success. With this background, they took June 23 off without company approval, preparatory for a June 24 social engagement in Rhode Island, coming in at midday only for their pay.

Their pattern of mutual contradiction and unreliability is such that they are not credited in their otherwise un-

[27] At the time, Covais was assigned to the penny wafer machine, which performs the final assembly process of the wafers or antishoplifting tags produced by the Respondent.

[28] The welding machine, a repetitive operation, was used to rework rejected parts. As jobs of varying duration were performed there, no formal quota had been set.

[29] Although the General Counsel demanded and received access to such of the Respondent's production records as would establish Covais' productivity performance relative to other employees, they were not introduced. Accordingly, it is inferred that if such records had been made a part of the record, they would not have supported the General Counsel's position.

corroborated accounts of having been observed by company officials while talking to union organizers on June 26 and 27.[30] In fact, their support for the Union was minimal. Although given authorization cards at the start of the Union's organizational drive on or about June 16, they did not sign them until June 27. There is no record that they had engaged in any union activity beyond privately signing their own cards.[31]

Rather, it would appear that the Respondent had tried hard to keep Manning and Covais as employees, perhaps in consideration of their youth. In so doing, Montalbano overruled DePietro and gave both girls pay raises and they were retained by Montalbano well after DePietro and Robins had advised that they be discharged.

The General Counsel's contention that Montalbano's discharge warning to Covais and Manning on Friday, June 23, for taking the day off without permission constituted an unlawful warning because based on their union sympathies appears forced, at best. Their reprimand occurred while they were engaged in cognizable misconduct. It predated the asserted incidents of June 26 and 27 which first connected them to the Union, and, during that interview, no union reference was made. Their infraction on June 23, in the context of their general absenteeism, tardiness, and Covais' work record, was such as would naturally draw criticism, if not worse. In these circumstances, I find that their reprimand that day by Montalbano was not violative of Section 8(a)(1) of the Act.

From the credited evidence and noting her poor general record with the Respondent, it is concluded that only Covais was terminated by the Respondent on June 28, and that Manning voluntarily resigned from her job with the Respondent by not returning to work after Covais was dismissed.[32]

No merit is found to the General Counsel's contention that Manning was constructively discharged when the Company caused her to lose her ride with Covais as depriving Manning of her only means of getting to work. As it has been found that Covais' discharge was not violative of the Act and that Manning was not terminated at all, any decision by Manning to thereafter leave the Respondent's employ would not serve to create a violation. Moreover, Manning did have means of returning to work without Covais' assistance had she so desired. Manning testified that she had told Montalbano on June 28 that her mother could drop her off at the plant. In addition, she lived in the town where the plant was located, was young, in apparent good health, and possibly could have walked the distance between her home and the plant, which she estimated would take around 30 minutes.

[30] The appearance by Covais and Manning and the June 28 union meeting occurred after their last day of work with the Respondent.

[31] Unlike the circumstances affecting Bellucci, Sapenoff did confirm that management officials had observed him in conversation with Manning and Covais.

[32] The conclusions concerning Covais and Manning are further corroborated by the relevant notations on their timecards.

2. Patrick Bellucci, Jr.

The termination of Bellucci on June 22 after what may have been his only infraction is in stark contrast with the Respondent's patient forbearance toward Covais and Manning. The Respondent concedes that Bellucci was a satisfactory worker and that his general record for attendance and punctuality played no role in the decision to terminate him. He had been fired because, on a single occasion, he left work before the end of his shift, requesting that another employee punch his card, and without obtaining prior approval from DePietro. His claim of illness at the time, although not contradicted, did not serve to mitigate his penalty. Bellucci's abrupt termination in these circumstances also apparently contravened the Respondent's policy of progressive discipline as described by DePietro. Under this practice, employees usually are not discharged for their first offense but customarily are spoken to several times by their supervisors before action is taken. There is no policy of written warnings.[33]

Unlike Covais and Manning, Bellucci had been active in the Union's organizational drive, not only by signing his own card, but in moving about the plant to solicit other employees to also sign cards. Covais was among the first employees approached. After the termination, Bellucci continued to work for the Union. Bellucci appeared to be a forthright witness who had been considered a reliable worker. He apparently had performed more highly skilled work than had Covais and Manning and, therefore, might be presumed to have been more useful as an employee. Yet, Covais and Manning provide the standard against which Bellucci's treatment must be measured. This was illustrated on June 23, when, after being cautioned but reprieved by Montalbano for having taken that day off without authorization and for their other latenesses and absences, Covais and Manning met Bellucci in the parking lot to learn that he had been discharged for going home early just once without permission.

I credit Bellucci's testimony that, on June 16, he and Vigliotti were observed by DePietro in their initial conversation with Sapenoff, and that he immediately thereafter entered the building and initiated a conversation with DePietro about the Union during which DePietro asked if they had signed a union card. Sapenoff corroborated that DePietro had observed them in conversation in the rear parking lot, and confirmed that he also had seen Trentacosti watching them with DePietro. As Trentacosti, Montalbano, and even DePietro evidenced acute awareness of Sapenoff's organizing activities in the rear lot, later accosting him there at least twice, it would appear quite consistent that DePietro would watch Bellucci as he spoke to the union representative. Less than 1 week later, Bellucci was terminated.

The General Counsel correctly contends that, although Bellucci started the conversation on June 16 concerning the Union, he was unlawfully interrogated by

[33] DePietro recalled having spoken to Bellucci in October 1977, while he was still a new employee, about overstaying coffee or lunch breaks, but had had no such conversations with him since that time.

DePietro who exceeded permissible bounds in asking if he had signed a union card. In concluding that this interrogation was violative of Section 8(a)(1) of the Act, I find it immaterial that Bellucci had initiated the conversation and that DePietro may not have been antagonistic in his questioning.[34]

Also, although not alleged in the complaint, the General Counsel asserts that DePietro engaged in unlawful surveillence of Bellucci's activities by watching him talk to Sapenoff in the parking lot on June 16. The Respondent, citing *Chemtronics, Inc.*,[35] argues that, even if it should be found that DePietro did observe Bellucci as he spoke to Sapenoff in the rear lot, this would not be violative of the Act.

In *Chemtronics, Inc., supra*, the Board restated the rule that "Union representatives and employees who choose to engage in Union activities at the Employer's premises should have no cause to complain that management observes them."[36]

The General Counsel, in response, argues that if the Respondent had observed only such union activities as had occurred in the parking lot and in other conspicuous places on its premises the *Chemtronics* rule would be applicable and this would not have constituted unlawful surveillance. However, the General Counsel would distinguish the present matter from *Chemtronics* in that here, as the June 28 and July 13 union meetings were invaded, respectively, by Paul Montalbano and Keith Minasy, although not on the Respondent's premises, the Company had attempted to conduct surveillance over union organizing activities wherever undertaken. As these incursions had prevented the Union from holding meetings away from the plant, in the General Counsel's view, the only available option was to organize at the plant. Accordingly, the Respondent's surveillance of the Union's activities at the plant was unlawful.

In agreement with the Respondent, I find that, under *Chemtronics*, the Respondent did not engage in unlawful surveillance by observing the union activities openly undertaken on its own premises. This includes not only DePietro's having watched Bellucci and Sapenoff while they talked together on June 16, but also other instances actually alleged in the complaint, including incidents on June 26, where Montalbano, Trentacosti, and Lane allegedly watched Covais and Manning talk to Sapenoff in the rear lot, and, again, on June 27 where Montalbano, while driving past, observed an asserted conversation between Covais, Manning, Sapenoff, and Bellucci.[37]

Contrary to the General Counsel, it has not been established that the Union's only two options in meeting with employees were either to do so openly on the Company's premises, or else in the most conspicuous areas of public establishments in the vicinity of the plant. As only Montalbano's uninvited appearance at the June 28 meeting was violative of the Act, the Respondent did not systematically invade union meetings and the Union had the alternative of selecting more private locations for its organizational gatherings. Accordingly, it is concluded that the Respondent, in observing employees talking to union organizers on its premises, did not engage in unlawful surveillance of its employees' union activities in violation of Section 8(a)(1) of the Act.

Although it has been found that the Respondent's notices concerning its timeclock policies had been posted during Bellucci's employment with the Company and that he is chargeable with knowledge of their content, it does not appear that these policies were strictly enforced. Rather, the testimony of Bellucci, Covais, and Manning that someone else, while with the Respondent, had frequently punched the cards of other employees at the end of the day was never effectively refuted, nor were statements by Covais and Manning that, contrary to company policy, after their first week on the job, they regularly drove off the Respondent's premises without punching out to buy lunch.[38]

Therefore, noting that Bellucci had been a satisfactory employee, had had good attendance and punctuality, had been active on behalf of the Union's campaign, had been unlawfully interrogated by DePietro as to whether he had signed a union card after having seen him talk to an organizer, and had been terminated soon thereafter, it is concluded that a principal cause of Bellucci's dismissal had been his union activities. In so concluding, reliance is placed on the disparate treatment afforded Bellucci in comparison to that shown Covais and Manning; that Bellucci's abrupt discharge without prior warning contravened the Respondent's policy of progressive discipline, and that the Respondent had not strictly enforced all aspects of its posted timeclock policies.

Accordingly, I find that Bellucci was terminated in violation of Section 8(a)(3) and (1) of the Act.

D. *Acts of Unlawful Interference, Restraint, and Coercion—Facts and Conclusions*

1. The alleged surveillance of the June 28, 1978, union meeting

On or about June 26, Sapenoff began to distribute literature outside the plant announcing "A short meeting . . . to plan and discuss the next steps in the drive to organize Knogo Corp.," scheduled for Wednesday, June 28, 1978, 4:30 p.m. at Rudy's Bar and Grill, a small tavern located approximately three-quarters of a mile from the plant.[39]

[34] *Peninsula Association for Retarded Children and Adults*, 238 NLRB 1099 (1978).

[35] 236 NLRB 178 (1978).

[36] See *Milco, Inc., et al.*, 159 NLRB 812, 814 (1966); *Larand Leisurelies, Inc.*, 213 NLRB 197, 204 (1974); *Mitchell Plastics, Incorporated*, 159 NLRB 1574, 1576 (1966).

[37] Even if the incidents of June 26 and 27 had been credited as having occurred, which they were not, they would not, in any event, have constituted unlawful surveillance under *Chemtronics*. Although the complaint alleges another act of unlawful surveillance on June 23, this is found to be without merit in the absence of supporting evidence.

[38] The testimony of Covais and Manning concerning their observations at the timeclock is accepted as it does not directly affect their part of this case.

[39] Sapenoff testified that, on the first day the literature concerning the meeting was handed out, he and another union representative were approached in the parking lot by Trentacosti and Montalbano who told them to leave the property. When the union representatives refused, the management personnel threatened to call the police. The union agents invited them to call the police but refused to leave the property, declaring

Continued

Approximately 15 employees attended the June 28 meeting, which started around 4:45 p.m. Sapenoff testified that he began to describe what his Union had obtained for other employees in the Respondent's neighborhood. However, approximately 15 minutes after the meeting began, Plant Manager Montalbano walked in and sat down among the employees who had arranged themselves in a semicircle around the head table occupied by Sapenoff. Sapenoff told Montalbano that this was a meeting only for the Company's employees, was not for management, and asked him to please leave. Montalbano replied that he would leave only if the people sitting there wanted him to depart. Sapenoff retorted that this was intimidation. The employees had come there to confer in a private meeting away from work on nonwork hours and he was not going to wait for these employees to ask Montalbano to leave; he, himself, was going to ask Montalbano to leave. The two men stared at each other. Sapenoff then told the employees that he would not continue the meeting with a member of management present, as they could not possibly talk about the things that were of concern to them. Sapenoff declared that, unless Montalbano left, he would then call an immediate end to the meeting. He started to fold his papers. At that point, Montalbano got up and walked from the meeting area to the bar.

Sapenoff attempted to get the meeting underway again, while Montalbano sat at the bar for another 10 to 20 minutes having a drink. However, the employees were too edgy so they sat in silence. The meeting disbanded at or about 5:15 p.m.

Montalbano conceded that he had inappropriately attended the June 28 union meeting at Rudy's Bar and generally corroborated Sapenoff's account. He had learned of the meeting from a union leaflet and spotted the company employees and Sapenoff gathered near the front of the tavern as he entered. He conceded going to the back of the room where the meeting was being held and sitting down at a distance of about 15 feet. As soon as he did so, all activity stopped.

According to Montalbano, Sapenoff approached and told him that he was interfering. When Montalbano said that he did not understand, Sapenoff declared that he was at a union meeting and, as management, was interfering with employees from his Company who were there. Sapenoff asked him to leave. Montalbano replied that he really did not want to say anything, just wanted to listen, and asked if Sapenoff objected. Sapenoff stated that he did object. Montalbano was management and was violating the Labor Act. Montalbano declared that he was very sorry, what must be must be, and announced that he would leave. Montalbano then rose and placed himself at a point along the bar approximately 30 feet from Sapenoff. There he had two drinks and left, having remained at the bar for a total of approximately 20 minutes. Although nothing prevented Montalbano from looking into the room where the meeting was held, he claimed that he did not do so. Contrary to Sapenoff's testimony, Montalbano denied that he had brought a pad with him to the meeting, and that he had written anything while there.

As Montalbano concedes having deliberately and improperly attended and interfered with the conduct of the June 28 union meeting, it is clear that he thereby violated Section 8(a)(1) of the Act by engaging in surveillance of the union activities of his Company's employees.

2. The alleged surveillance of the July 13, 1978, union meeting

Subsequently, Sapenoff distributed literature outside the plant announcing that another meeting would be held at Gatsby's Pub on Thursday, July 13, 1978, at 4:30 p.m.[40] The meeting's purpose as shown on the notice was to consider the "next steps in the organizing drive."

Sapenoff testified that only 2 employees attended the July 13 meeting, compared to the approximately 15 who appeared on June 28. They waited for some time for other employees to show up. When no one else came, the men went to the bar and ordered a round of drinks. Shortly thereafter, a young man walked in who was identified to Sapenoff as Keith Minasy, son of the Company's owner and president, Arthur J. Minasy.

Sapenoff related that Keith Minasy sat down at the bar and had a drink about 15 feet from the table next to the pinball machine where Sapenoff and the two employees were seated. Minasy then went to the pinball machine and started a game. At that point, Sapenoff asked Minasy who had sent him down to crash the meeting. When Minasy replied that no one had sent him, Sapenoff told him that someone must have sent him down and asked if it was his "old man." Minasy became upset and told Sapenoff that he should not call his father an old man. Sapenoff replied that he did not care who Minasy's father was. The fact was that this was the second meeting that he had been trying to hold and it was the second meeting that someone from management or close to management had crashed; rank intimidation. Minasy replied that he could go to any public place he wanted whenever he wanted, whether or not there was a union meeting in progress. Sapenoff replied that the Union's lawyers would check into that. As the conversation was turning heated, Sapenoff told the two employees at the meeting to forget it for the night, suggesting that they leave. Sapenoff departed with them.[41]

Keith Minasy, unlike Montalbano with respect to the June 28 incident, testified that he had not known that a union meeting was scheduled from Gatsby's Pub when he went there on July 13. He customarily went there for social reasons every Friday night and sometimes was there on Thursday nights, and weekends, as well.

Minasy testified that when he entered the bar he ordered a drink which he started to consume while standing at the bar. After about 5 minutes, someone called his name. He recognized the caller as an employee he knew

there was nothing improper in giving out union literature in nonworking areas during nonwork hours and they would continue to do so. However, Sapenoff did leave his position and move to another place at the request of Trentacosti and Montalbano. There were, perhaps, two such confrontations in this period.

[40] Gatsby's Pub was located approximately 1-1/2 miles from the plant.

[41] The meeting had been scheduled for a small alcove to one side near the front door. There was no partition for privacy and they could be readily observed.

only as Igor who asked him to come over. Accordingly, Minasy approached and greeted Igor. Just then, Sapenoff asked if he were Minasy's son. When he replied that he was, Sapenoff asked if he always was there breaking up meetings. Minasy replied in the negative, that he had just come over to say hello. Then realizing that some session might be in progress, Minasy stated that he would gladly take his drink and go back to the bar. Sapenoff again asked if Minasy knew that he was breaking up a union meeting. Minasy replied that he often came to this bar and that Sapenoff should not try to have him thrown out of a public place. He told Sapenoff that if he wanted to have his meeting he should do so in a private place, reiterating that he frequently came to this bar when he had extra time and was going to have his drink. He announced that he would leave their table immediately and they should continue with their meeting. He would be gone within 10 minutes, as soon as he finished his drink. Minasy also recalled that he become upset during this conversation when Sapenoff asked if Minasy's "old man" had sent him down to spy and had replied heatedly.

Minasy played a game on the pinball machine while he finished his drink, and then departed.

Minasy related that the next morning, July 14, he went to Montalbano's office where he told Montalbano and Trentacosti that he felt bad because he had gone to Gatsby's at or about 5:15 the evening before and accidently had walked into a union meeting. Montalbano and Trentacosti asked the names and number of employees who were at the meeting he had interrupted. He replied that he had not known that there was a meeting but that three people had been sitting around the table. Montalbano reassured him that what was done was done.[42]

The General Counsel contends that Keith Minasy, employed by the Respondent as an accountant, engaged in unlawful surveillance of the July 13 meeting as a supervisor and/or agent of the Respondent. The General Counsel's agency theory is predicated upon an assertion that, at the time in question, his father, Arthur Minasy, was the Respondent's majority shareholder and chief executive.

Keith Minasy testified that, in June 1978, between 200 to 300 stockholders held a total of 1,040,000 shares, and that his father owned slightly more than approximately 46 percent of the outstanding stock.[43] Keith Minasy, himself, owned no stock. However, 60,000 shares, not owned by his father, were held in trust for him and like amounts of additional stock were also in trust for each of Keith Minasy's two sisters. The trustee, an attorney, exercised the voting privileges.

In the summer of 1978, Keith Minasy was an accountant with the Respondent. His duties included performing bank reconciliations, posting payroll to the general ledger, computing costs of goods sold, calculating cash bank balances, and consolidations.[44] He also signed paychecks. Minasy, who reports to Fred Weobsie, the company controller,[45] does not have access to employee personnel records or to records concerning labor relations. He does not attend supervisory meetings or meetings where labor relations are discussed. No employees are assigned to work under his direction and Minasy has no secretary.

Keith Minasy has never made any recommendations and has issued but one routine memorandum, having first received Weobsie's permission. At the time of the hearing he was unmarried and lived at home with his parents.

Keith Minasy first worked for the Respondent in the summer at age 13, doing cleanup work. His association with the Company began in earnest when at age 16 he became a stock clerk. At age 18, he became a purchasing assistant, working under the controller and the purchasing agent, for 1 year during a break in his college career. By June 1978, he was employed as an accountant performing the above-noted functions. Minasy is not on the board of directors, as is his father, and holds no office with the Respondent other than that of accountant.

On the foregoing undisputed testimony, noting that Keith Minasy meets none of the statutory criteria, it is concluded that he is not a supervisor within the meaning of the Act. However, as Keith Minasy was recognized within the plant as the son of the Respondent's president and chief executive, signed the paychecks, lived with his parents, was beneficiary to an appreciable trust of the Respondent's stock, and derived his principal, if not sole, income from the Respondent, I find that Keith Minasy had status to act as an agent of the Respondent within the meaning of the Act.

However, unlike Montalbano, the evidence shows that Keith Minasy's presence at Gatsby's Pub on July 13 was not intentionally related to the union meeting scheduled for that place. Minasy regularly frequented this nearby tavern, sometimes several times a week, and the union meeting was held in a conspicuous unenclosed area in the front part of this establishment. There is no indication that Minasy knew of the meeting in advance or was there to exercise or attempt to exercise surveillance of the planned meeting. Rather, he was drawn into a discussion by Sapenoff, became upset by an abrasive reference to his father, and left the premises after finishing his drink. Any impression the employees received that they were under surveillance was purely personal on their part.

It therefore is concluded that Keith Minasy did not engage in unlawful surveillance by visiting Gatsby's Pub on July 13.[46]

[42] Although Keith Minasy related that these management officials attempted to gain information from him about the meeting the next day, when he told them he had inadvertently interrupted the session, there is no evidence that he had been asked to attend the meeting in advance, and, as the General Counsel contends, and the record shows, that Minasy was not an employee within the meaning of the Act, there was nothing unlawful in his being questioned about the meeting on July 14.

[43] The Respondent's stock is traded on the New York Over-the-Counter Exchange and is quoted daily in the Wall Street Journal.

[44] Posting the payroll to the general ledger is done every Friday when the computer printout containing an itemized list of the salaries of all employees are received. These and the tax and other withholdings are posted to the general ledger.

[45] Weobsie, in turn, reports to James Dellamo, vice president of finance, who is responsible to Arthur Minasy.

[46] *Sports Coach Corporation of America*, 203 NLRB 145, 149 (1973).

3. Alleged unlawful benefits

The Union's organizational campaign continued from the summer of 1978 to July 20, 1979, when the Union was unsuccessful in the representation election in Case 29-RC-4562. The General Counsel and Union contend that the Respondent, during the latter phases of the Union's drive, continued to engage in unlawful acts, some of which were sufficient to warrant the setting aside of the election and the issuance of a bargaining order.

One of the allegations against the Respondent is that, during the organizing drive, the Company granted certain new job benefits to discourage employees from supporting the Union. These changes were set forth in an employee handbook, issued for the first time in March 1979, and were called to the employees' attention in an accompanying memorandum from the Respondent's president, Arthur J. Minasy.

According to the handbook, and as explained by the Respondent's director of operations, Michael Trentacosti, employees with 90 days' service who worked both the day before and the day after the holiday were entitled to receive eight paid holidays each year. These included a new paid holiday for each employee's birthday. To be eligible for the other referred benefits, an employee must have been on the Respondent's payroll for at least 6 months. After acquiring such seniority, employees accrued 1 day of paid sick leave for each 10 weeks of service to a maximum of 5 days per year. Employees with 6 months of service, called to jury duty, became eligible for the difference between their wages and jury duty pay to a maximum of 2 weeks, and those who prove loss of a member of their immediate family could receive 3 days of paid bereavement.

Trentacosti explained that these benefits had been effectuated in an effort to counter high employee turnover and to overcome recruitment difficulties, matters of long-standing concern. He first had discussed improving the benefits package with James R. Dellamo, the Respondent's vice president for finance, in 1977, but at that time the Respondent was in financial difficulty and nothing could be done. However, conditions got better in November 1978, when the Respondent improved its financial standing through a large stock issue.

In November, Trentacosti consulted with an official of the Respondent's labor relations consultant firm concerning the Company's difficulties in hiring and retaining employees.[47] This official put Trentacosti in touch with Joyce Rios of his office, who had had prior experience in personnel management. After consulting with Trentacosti, in December, Rios began to draft a benefits package to make the Respondent's employment practices more competitive.[48]

Work on a proposed benefits program continued in the months that followed. On February 7, 1979, while this was in progress, and after the Respondent had learned of a union leaflet wherein the Union claimed majority support, the Company filed a petition for election in Case 29-RM-594. This petition was dismissed, however, on February 15, as "it appears that because no claim for representation had been made to [the Respondent] by any labor organization, no question concerning representation exists. . . ."[49]

On March 5, Trentacosti and Rios obtained approval from President Minasy for issuance of the proposed handbook containing the described new benefits. The handbook which also codified existing work rules was issued to all employees on March 9, effective retroactively to March 1, 1979. The Respondent's employees were not informed of the benefits program under consideration until the issuance date.[50]

The record reveals that the package of benefits thus provided by the Respondent constituted a series of economic improvements made available to its employees in the context of the Union's organizational campaign. They were not part of a continuing periodic review or adjustment by the Respondent of terms and conditions of employment.

In December, when Trentacosti and Rios began work on the benefits package, there was an awareness that the Union's drive was still in progress.[51] The first part of this proceeding had closed but about 1 month before. The work on the package nonetheless was begun and continued, and, during the next slow period in the Union's campaign, the Respondent petitioned for an election. When the Union declined to participate, the benefits were implemented.

Although the Respondent's personnel policies did become comparatively frozen and unresponsive during the Union's prolonged campaign, they also were that way for years before it began. It is well established that new economic benefits cannot be afforded by an employer during such a drive where a purpose or necessary effect would be to discourage employees from supporting the Union.[52] With differences in unit size and other problems, not every organizational campaign can be quickly completed, and, as will be discussed, the Respondent's conduct during the course of the Union's drive contributed to its duration. To sanction the Respondent's action in granting job benefits after seeking to push the Union prematurely into an election would be to create an undesirable tactical formula.

Accordingly, it is concluded that in granting its employees new economic benefits in the form of paid sick

[47] Trentacosti testified that the Respondent had experienced a 20–25 percent employee turnover in the fourth quarter of 1978. He blamed the Respondent's noncompetitive personnel policies for this situation.

[48] Union Representative Sapenoff confirmed Trentacosti's observation that the Union's campaign had slowed down during the months of September, October, and November 1978, but had become more active in December 1978 and January 1979. In fact, in December, Rios, learning that Sapenoff was distributing union literature outside the Respondent's plant, had cautioned Trentacosti against initiating any new benefits or policy changes until advised by counsel. Although the Union continued to solicit, no new authorization cards were signed between mid-January and early April 1979.

[49] With Rios' assistance, a series of help-wanted advertisements were placed in area newspapers starting in early January 1979. Such ads earlier had been placed throughout 1978.

[50] Although the handbook as issued contained an unlawfully broad no-solicitation rule, this was corrected on March 21 by amendment.

[51] Rios, having heard that Sapenoff was distributing union literature at the plant, had cautioned Trentacosti in December not to institute any pay or policy changes without the advice of counsel.

[52] *N.L.R.B.* v. *Exchange Parts Company*, 375 U.S. 405 (1964).

leave, bereavement leave, jury duty, and an extra paid holiday, at least in part to counter the Union's pending organizational drive, the Respondent violated Section 8(a)(1) of the Act.

4. The alleged discriminatory no-access rule

As described above, Sapenoff began his Union's organizational drive in mid-June 1978 by approaching and talking to employees in the employee parking lot to the rear of the Respondent's premises, where, in good weather, many took their break and lunch periods. It was there that he first contacted Patrick Bellucci and other employees, and union literature and authorization cards were distributed there.

Although when the Union's campaign first began, there had been at least two confrontations with Company officials who had asked that Sapenoff move off the Respondent's premises, in the months that followed, he and other organizers, who occasionally assisted, continued to have access to employees in the rear parking lot without further management interference.

Sapenoff testified that on May 1, 1979, believing that his Union had achieved majority status,[53] he went to the Respondent's offices accompanied by two other organizers. There, in Minasy's absence, they met with Trentacosti, claiming majority support and requesting recognition and bargaining. Trentacosti replied that he would turn the matter over to the Company's attorneys.[54]

Sapenoff related that, when he returned to the Respondent's premises the next day to continue his organizing activities, he observed some workmen erecting what appeared to be a fence in the vicinity of the rear parking lot. On the first day, only a series of steel pipes had been sunk into the ground. The work continued, and, when completed on or about May 10, the rear parking lot was closed off by a fence approximately 6 feet high topped by barbed wire.

Sapenoff arrived at the Respondent's premises shortly after 4 p.m. on May 10, the day the fence was completed, and noticed that the gate had been locked. At or about 4:30, as the day-shift employees were leaving and the night-shift crew was arriving, he saw Trentacosti, Plant Manager Montalbano, and a third unidentified man unlock the gate and repeatedly open and close it to enable the egress of each approaching individual car. This resulted in a backup of automobiles waiting to leave and to enter the Respondent's premises.

When Sapenoff returned the next day, shortly before noon, no management officials were present, but the gate was locked and attended by a uniformed guard. In response to Sapenoff's query as to what was required to enter the parking lot, the guard replied that it was necessary to have business there. When Sapenoff told the guard that he was from the Union that was conducting an organizing campaign and asked if that were reason enough to be allowed in, the guard replied that he had been instructed to keep Sapenoff out.

At noon, the employees filed into the rear lot for their lunch recess. The guard made notations on a pad as some of the workers went through the unlocked gate. A food truck was permitted to enter through the gate and go into the lot, as before. It remained for about 15 minutes while employees made purchases. At the end of the shift, persons known to Sapenoff to be relatives or friends of the Respondent's employees arrived to call for them, also entering through the gate.

Approximately 2 to 3 days later, Sapenoff saw a new guard at the fence. Unlike the first, this guard was armed. Sapenoff identified himself and asked the same questions about gaining entry as before, and was told that the guard had been instructed not to talk to him and not to allow him on the premises. When, several weeks later, Sapenoff found yet a third guard at the gate, this time unarmed, he again was refused permission to enter the parking lot after he had identified himself as being from the Union.

In addition to the food truck and the friends and relatives of employees who provided transportation, delivery trucks from the Respondent's suppliers also regularly went through the gate and, on several occasions, a former employee named Charlie Matthews was allowed onto the lot so that he could ask about future softball games from teammates employed by the Respondent.

Although the parties stipulated that from May 10 until July 20, the date of the election, Sapenoff had reasonable access to the Respondent's employees, although in a different manner than before May 10, the record shows that after the fence was constructed Sapenoff's ability to approach employees on the Respondent's premises was materially reduced, and he and such other organizers as occasionally assisted him could no longer go to the rear parking area where much of their previous activity had taken place. Rather, they were required to distribute their cards and literature and otherwise communicate their message, principally through car windows of employees who slowed their vehicles on the driveway, by approaching employees outside the Respondent's premises as they were being picked up after work, by talking to relatives and friends of employees to enlist their support, and by speaking through the fence with those employees willing to risk doing so under the guard's scrutiny.

The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act in connection with the fence by promulgating and using the guarded fence to enforce a discriminatory no-access rule whereby the food truck and other nonemployee visitors were allowed access to the rear parking lot while union representatives, for the first time, were excluded.

The Respondent denies any discriminatory intent or practice, and asserts that the fence was constructed and maintained as a neccessary security measure.

James R. Dellamo, the Respondent's vice president for finance, testified that in mid-April 1979, after a series of incidents had occurred in the rear parking lot during the

[53] The General Counsel and the Union assert that the Union did not actually obtain the support of a majority of the Respondent's unit employees until June 14, 1979.

[54] On the same day, the Union repeated its demand for recognition and bargaining in written correspondence, and filed the petition in Case 29-RC-4562.

night shift,[55] he recommended to the Respondent's president that the rear parking area be fenced off and enclosed, reporting that there had been instances where unauthorized persons had been found in the building, that cars parked on the property had been ransacked, and that it had been necessary to call the police on one occasion at 1 a.m. because a suspicious looking car had been parked in the lot. In recommending the fence, Dellamo observed that other companies in the area also had constructed security fences around portions of their premises.[56] Dellamo suggested that only the rear section of the Respondent's premises be so enclosed to protect the area where the employees left their cars and where they went out on breaks. The front part of the building would remain open as before.

Minasy approved the idea of constructing a security fence and asked Dellamo to determine that such a fence would not violate the Company's lease. Dellamo delegated the details of contracting for and erecting the fence to Montalbano, reviewing only the proposed cost and writing the check in payment therefor.

On May 10, the first day the fence was fully in place, Dellamo learned that the employees could not get out to go home because the fence was locked. He and Montalbano were required to go outside, unlock, and open the gate. A traffic backup of cars waiting to leave and enter developed that evening.

That night, Dellamo sent a telex to Minasy, who then was in Europe, stating that it was ridiculous for his senior management officials to be opening and closing the gate, and requesting permission to hire a guard. Minasy authorized the guard by telex, dated May 11. Dellamo then also delegated the task of contracting for guard service to Montalbano, who, in turn, entered into an arrangement with one of the larger private security agencies for the services of a single guard. No armed guard was requested or billed. While an armed guard was temporarily assigned to the Respondent's premises, this was done by the agency, itself, because of a manpower problem. Montalbano, who dealt with the guard service and instructed the individual guards, denied that either he or any of the guards had made reference to the union organizers in the area after the fence was put up. The guards had not been directed to take notes while on duty and no such notes were ever shown to him.

Each morning, the day foreman or maintenance man unlocks the fence, which remains open from 7 to 8:30 a.m to allow the day shift to enter. The gate is then locked, but is reopened again at or about 10 a.m. to allow the food truck to come in for the morning break periods. The guard comes on duty between 10 to 10:30 a.m., and usually opens the gate for the food truck, unless he is late, then the maintenance man does it. When the food truck leaves at or about 10:30, the fence is again locked until around 11:55 a.m., when the food truck returns, and remains open thereafter until 12:45 p.m. The gate is reopened at 3 p.m. for the 15-minute afternoon recess, and again at 4:20, when the day-shift employees begin to leave. The night shift starts to arrive at 4:30 and the gate is open until around 5:30 p.m., when the guard locks it and leaves. During the night shift, the gate is opened by the foreman at 9 p.m. if employees want to leave the Company's premises for their meal period, and at 1:30 a.m., when the night crew leaves.

In *Chrysler Corporation, Dodge Truck Plant*,[57] the Board found that the respondent there had discriminatorily applied a "no-access" rule in violation of Section 8(a)(1) of the Act by excluding union representatives from its fenced premises while allowing entry to food trucks and other nonemployee vendors.

No merit is found to the Respondent's argument that the present case is materially distinguishable from *Chrysler Corporation, supra*, on the ground that there, unlike the present matter, the respondent's premises was found to be "a hot-bed of commercial activity" and that the no-access policy was honored more in the breach than in the observance. While there may have been less commercial activity in Knogo's parking lot than in Chrysler's while union representatives were excluded under the respective no-access rules, the test of legality does not center on degrees of occurring discrimination, but on whether the rule, as enforced, is discriminatory.

Although the Respondent argues that the rear parking area, before the fence was completed, was not readily accessible to the general public, the fact is that Sapenoff and his union associates had been organizing there for almost 11 months when the fence was built. Its installation and use deprived them of access previously enjoyed. The presence of the fence had a natural inhibitory effect, indicating trespass, whether or not locked, and this effect was enhanced by the presence of a guard, whether or not armed. Although Montalbano testified that, while aware of Sapenoff's continuing activities, he had not instructed the guards to keep Sapenoff out, he did not testify that he had directed the guards to allow him to enter. Sapenoff's testimony that he had been refused entry at the gate by three successive guards was never effectively rebutted.

It is not an answer to the Respondent's unevenly applied no-access rule, as experienced by Sapenoff, that the gate was unlocked and unguarded between 7 to 8:30 a.m., while day-shift employees were arriving for work, or that on one occasion, before work on the fence was completed, Trentacosti had spotted him inside the newly driven fence posts without chasing him from the premises. Sapenoff's testimony throughout this proceeding, even before the erection of the fence, showed that his principal activities in the rear parking lot occurred while the employees were there during the lunch recess. However, the guard at the gate allowed the food truck to enter at lunchtime, as before, while excluding him. That Sapenoff was not sent from the premises before the fence was completed merely tends to illustrate the access he thereafter lost.

Although the parties stipulated that, after the completion of the fence on May 10, Sapenoff continued to have

[55] The night shift, which was started in the autumn of 1978, works from 5 p.m to 1:30 a.m.

[56] At the hearing, Dellamo estimated that about half of the 10 to 15 buildings in the Respondent's area have fences, and about 2 employed guards.

[57] 232 NLRB 466 (1977).

reasonable access to the Respondent's employees, although in different form than before May 10, the term "reasonable access" may be variously defined. In any event, a discriminatorily applied no-access rule, if established, is an independent violation and the General Counsel need not make a prerequisite showing that, as a result, the Union was deprived of all access to employees. In the present case, it is clear that Sapenoff could no longer leisurely approach and talk to employees while they were having lunch by their cars, but was reduced to talking to some of the braver ones through the fence while the guard was standing by, to talking to them through their car windows as they slowed to turn onto the main street, and by trying to talk to those employees who were being picked up just outside the Respondent's premises. It is clear that the Union's ability to reach employees was substantially reduced as a result of the guarded fence.

While the incidents referred to by Dellamo may have played a role in the decision to construct the fence, its timing is subject to question. Work on the fence began immediately after the Union's request for recognition and bargaining and the filing of the representation petition, and the fence was completed within 10 days thereafter. Although the incidents that had caused Dellamo to recommend installation occurred at night, no guard was on duty after 5:30 p.m. The Respondent, at best, expanded its use of a beneficial security device to shut out the Union. It therefore is concluded that in constructing and maintaining the fence so as to exclude union representation for the first time from the rear parking lot, while continuing to regularly admit a nonemployee vendor, the food truck, the Respondent promulgated and enforced a discriminatory no-access rule affecting its premises in violation of Section 8(a)(1) of the Act.[58]

5. The coercion of known union adherents and the created impression of surveillance of their activities

On July 11, 1979, a group of about seven employees, which included Julia Falco and Nick Christofides, were summoned to meet with the Respondent's president, Minasy, in his office. It is conceded that Trentacosti, who was also present at the meeting, assisted by DePietro, had selected these employees from different departments, to meet with Minasy, at the president's request, because of their presumed influence among other shop employees and their observed union activities; i.e., witnessed conversations with Sapenoff and his associates.

After the employees, who had been ushered into Minasy's office by Trentacosti, were seated, Minasy entered with a portable tape recorder, which he turned on.[59] Minasy told the assembled employees that he had asked to meet with this particular group as, in the opinion of their supervisors, they possibly were the most influential in the shop and, perhaps, the most interested in the organizing activities then going on. Minasy stated that he wanted to present the Company's views concerning the union matter and to elicit their aid in telling the Company's story.

Minasy asked if the employees were familiar with the Union that was attempting to organize them, declaring that he had some information about this particular Union, its affiliations, and some of its principals. He asked if they had ever met Milton Silverman, an official who had gone to jail for embezzling funds, and if Silverman had ever come out to meet with and talk to them. Minasy also produced newspaper clippings of union misconduct and violence, which he invited the employees to examine.

Minasy told the story of how the Company had been built and reminded the employees that when a fire had destroyed the Respondent's premises, no one had been laid off; the employees had been provided with a good place in which to work. Minasy affirmed his pride in the profitable Company and in his Rolls Royce, which he felt he had earned through hard work.

During the meeting, Minasy reassured the employees several times that: under the law, they had the right to organize and to select a union to represent them. However, in his view, this was a serious matter. There were many unions available for the employees to choose, and as the decision to select a union was more important than the decision to buy a small commodity, there was no harm in shopping for a union, as well, if that is what they wanted. There were other unions more dedicated to the employees than was this particular Union.

Minasy informed the employees that the fact that they had been selected to attend this meeting did not constitute any form of personal criticism. He was a salesman for himself and for the Company, just as the union organizers and representatives were salesmen for the Union. However, Minasy continued, there were restrictions placed on him where he could not make promises as the promises he made he could not keep. On the other hand, the Union that was soliciting them could make promises as a matter of campaign rhetoric but could not deliver on such promises. They could only negotiate.

When Falco asked why this particular group of employees were there, Minasy replied that it was because he understood that they were very strongly in favor of the Union, were leaders in the shop, and as he wanted them to carry the Company's message, as well.[60]

Also during the meeting, in response to Minasy's inquiry as to whether any of those present had worked in a place where they had made less money, Christofides answered that he had. Minasy asked why he did not go

[58] *Chrysler Corporation, Dodge Truck Plant, supra.* Although the Respondent, as argued, may derive some business benefit from the presence of the food truck in that employees are encouraged to take lunch and refreshment on the Respondent's premises and be available to return to work on time, employees are not required to stay on Company grounds and the record shows that some do not. The food truck however useful is not directly a part of the Respondent's business operation as are the suppliers' trucks that also come through the gate. The record shows that employees still would have ready access to the truck even if it were only permitted to the area just outside the gate.

[59] No complete recording of the meeting was recovered.

[60] While Minasy emphasized that he only told the employees that they were there because they were influential within the shop and as he wanted their help in carrying the Company's message to the other employees, I credit the testimony of Falco and Christofides that Minasy also told the employees in effect that they were there because of their union sympathies.

and organize there. When Christofides asked why he had not been getting raises, Minasy told him that he could always find himself another job.[61]

From the foregoing, it is concluded that the Respondent violated Section 8(a)(1) of the Act when, less than 10 days before the scheduled representation election, it coercively singled out employees considered to be union supporters, summoning them to the president's office—a locus of authority—so that Minasy could attempt to dissuade them from their union allegiance. Although not specifically alleged, I also find that Minasy's conduct in telling these employees that they had been brought to meet with him because they were strong union supporters further violated Section 8(a)(1) of the Act by creating an impression of surveillance of these employees' union activities.[62]

6. The Respondent's other preelection meetings with employees—alleged solicitation of grievances

During the week that preceded the July 20 election, Minasy conducted a series of approximately eight meetings with employees in the Company's conference room. Each of these meetings were attended by about 7 to 10 employees and, according to Minasy, were uniformly conducted. At each session, he read a prepared script to the assembled employees. Trentacosti and DePietro attended some, but not all these meetings.

After the employees had been seated around the long conference table and offered coffee and doughnuts by Minasy's secretary, Minasy would come in with his text, which, in relevant part, was as follows:

> All of you know that 810, the Teamsters, have been outside the doors soliciting membership for about a year. Their overpriced organizers are standing out there because they make their living and keep their jobs based on how many people they can get to pay twelve to fifteen dollars a month in dues plus, assessments, initiation fees and fines.
>
> You will never see the real head of the Union, Miltie Silverman, because he has not been out of jail for more than five years. The labor law provides that anyone convicted of embezzling union funds or any other type of felony, cannot be an officer or represent a union. Silverman has a few more years to go . . . .
>
> I recognize that the success of our Company is due to your working and producing a product that I have been able to sell successfully all over the world. I want the opportunity to share this success and growth with you and your families. I tried this a few months back and the Teamsters filed a charge with the National Labor Relations Board saying that it was illegal for me to improve your wages and benefits. Think about that a minute! They have been screaming that I treat you unfairly, and yet, when I tried to do something, they complained to the government.
>
> * * * * *
>
> What can these teamster recketeers [sic] do for you? Can they give you a wage increase? Can they give you better benefits? Can they give you jobs? The answer is obviously "no"! But they can promise you these things. In fact, government permits the Union to promise anything and everything because the government recognizes that it is just campaign rhetoric.
>
> On the other hand, I am not allowed to promise you anything, especially as far as wages, job security and improved fringes, because the government knows I can deliver it.
>
> * * * * *
>
> . . . We want you to have an oppportunity to grow with the Company. As better-paying jobs grow with the Company. As better-paying jobs develop, whether it be in the plant or any other part of the Company, we want to look to upgrade our own people first, before we go to the outside. We can do this as long as there are no contractual rules that restrict us. . . . The Company has been successful—we are growing—we want to share that success with you by maintaining wages and fringes that are as good or even better than comparable jobs in the area and by maintaining our competitiveness in the marketplace.[63]

From the foregoing text of Minasy's speech to the different groups of employees, it is concluded that as remarks thus made tended strongly to impress upon employees that they did require a union to receive improvements in job benefits and compensation, and implied that further economic improvements would have been forthcoming but for the initiation and progress of the Union's campaign, these comments had the foreseeable effect of placing the onus for any delay in their implementation on the Union. His statements in this regard, therefore, were in violation of Section 8(a)(1) of the Act.[64]

Christofides related that, at the meeting in this series to which he had been called on July 17, he announced

[61] Minasy gave a somewhat gentler account of these exchanges, which were described by Falco and Christofides. Minasy related that it was his secretary, Lillian Curry, also present, who had asked if Christofides had ever worked anywhere else, and if that place had been better or worse than Knogo. When Christofides replied that it had been worse, Minasy smiled and asked if Christofides did not think that that would be a better place to start. He also told Christofides that in this country everyone was free to work where they chose. If it applies and Christofides did not like his job, he was free to go someplace else. To the extent that these accounts differ, I credit that described by Christofides and Falco because of Minasy's evident hostility to the Union.

[62] The facts underlying the conclusion of impression of surveillance reached herein were litigated at the hearing and are closely related to matters actually alleged.

[63] As one such meeting came to an end, employee Thomas Beck, Jr., volunteered that he had signed a card for the Union, explaining that as he had not worked long for the Company, he had incorrectly believed that it was a union shop. Minasy replied that what Beck had done was not important.

[64] See *Tipton Electric Company, and Professional Furniture Company*, 242 NLRB 202 (1979), enfd. 621 F.2d 890 (8th Cir. 1980); *Sta-Hi Division, Sun Chemical Corporation*, 226 NLRB 646 (1976).

that a supervisor had told him to write down the names of his friends in the shop and the benefits they would like to receive and to give this list to the supervisor, who promised to obtain them. Minasy replied that it was not he who had said that. The General Counsel argues that this constituted an unlawful solicitation of grievances by the supervisor.

Christofides testified that the incident to which he referred at the meeting took place on or about July 13, 1 week before the election, when DePietro, his supervisor, came to his work station and asked how he felt about the Union. Christofides replied that he was for the Union and had signed a card. Now, however, he was going to get into more action as he had been called into Minasy's office and had been accused of being a union organizer, referring to the special July 11 meeting of union sympathizers described above. DePietro then told Christofides to go to his friends and see what benefits they wanted, and to write down the names of his friends and the benefits they wanted and to bring the paper to him.

DePietro recalled that, on the day in question, he had gone to Christofides' work station to help him adjust his machine which was not operating properly. After the machine was corrected, Christofides mentioned that he and other employees had just been to a meeting with Minasy and they were making it look as though he was a union organizer. As that was the way it was, he would become one. DePietro asked if he were not one. Christofides replied that he was not. When DePietro asked if Christofides had signed a union card, Christofides denied that he had done so, stating that he was not interested.

Christofides then asked if DePietro knew why the Respondent considered him to be a union organizer, and explained that, at a softball game one evening, Keith Minasy had picked up his jacket and some union cards had fallen out. DePietro asked what he would have thought had he been Keith Minasy.

When Christofides continued to complain about having been called to the meeting with Minasy and about not being paid enough for operating the laminating machine, DePietro told him that he was just breaking in on the machine. When he got to know it as did the others, he would be paid the same amount reminding Christofides that he had only been there for about 2 months. DePietro suggested that, if Christofides had any gripes, he should have aired them with Minasy. Christofides replied that he did not have a chance. DePietro then told him that, if he had any other complaints, why did he not have the Union put any promised benefits on paper and sign it. DePietro denied having told Christofides to bring the paper back to him.

DePietro's version of their July 13 conversation is credited as the most convincingly detailed and internally consistent account. Christofides, in his own testimony, appeared to be uncertain as to whether DePietro actually did tell him that he would bring the list of desired benefits to Minasy. In addition, when DePietro described their conversation, he was personally disinterested, having by then left the Respondent for other employment.

Accordingly, from the credited evidence, it is concluded that although Christofides had initiated the topic of the Union, when DePietro asked if he was not a union organizer and if he had signed a card, such questioning constituted interrogation in violation of Section 8(a)(1) of the Act.[65] Having accepted DePietro's version of this event, contrary to the General Counsel, I do not find that the bare suggestion by DePietro that Christofides try to get a signed list of benefits from the Union constituted an unlawful solicitation of grievances or an improper promise of benefits made to discourage support for the Union.

E. *The Applicability of a Bargaining Order*

1. The appropriate unit

The July 20, 1979, election conducted pursuant to the Regional Director's Decision and Direction of Election issued June 12, involved the following unit, the appropriateness of which is not disputed, and which is hereby reaffirmed:

> All production, maintenance, shipping, receiving, stock and quality control employees, inspectors, testers and material handlers employed by the Respondent at its 100 Tec Street and 33 Tec Street, Hicksville, New York, locations, excluding all office clerical employees, field service representatives, salesmen, professional employees, guards, watchmen and supervisors, as defined in the Act.

2. The Union's majority status

The parties agree that on June 14, 1979, when the General Counsel and the Union contend that Local 810 achieved majority status, there were 101 specifically identified employees within the appropriate unit. In support of the Union's claim of majority representation, the General Counsel introduced 54 signed authorization cards[66] obtained during the Union's year-long organizational drive. Of these, 17 cards were identified by Sapenoff as having been signed in his presence, 4 cards were identified by the employees whose names appeared thereon or who testified that they had signed such cards, 3 signed cards had been received by the Union via the mails, and a total of 13 cards were obtained through the efforts of key employees. In addition, Sapenoff identified 17 more cards that had been given to him completed and signed by the employees involved after he had given them blank authorizations. At the hearing, over the Respondent's objection, I received in evidence those cards which remained unidentified by the employees who signed them and which had not been recognized by Sapenoff or other solicitors as having been signed in their presence. Sapenoff and the employees who had assisted in gathering these cards on the Union's behalf testified that these authorization cards were obtained in the

[65] *Peninsula Association for Retarded Children and Adults, supra.*

[66] Although 56 cards actually were introduced, this figure included cards signed in June 1978 by Linda Covais and Helen Manning, alleged as discriminatees. As it has been found that neither Covais nor Manning had left the Respondent's employ under unlawful circumstances, nearly a year before the date of asserted majority, their cards are not counted as valid designations.

course of the Union's organizational campaign in the same manner as the cards to which there was no objection. These cards were distributed from mid-June 1978 until June 14, 1979, and some cards were given to employee supporters and to friends and relatives of employees for distribution. After the cards were filled out, they generally were returned to Sapenoff, either directly by the employees who had signed them or by the individuals who had secured them. Some, as noted, were returned in the mail. The cards so received remained in the possession of the Union or the General Counsel until offered in evidence. At the hearing, the Respondent had ample opportunity to check the authenticity of the signatures on the cards by comparing them with signature standards appearing on company records, including job applications, W-4 forms, and endorsed canceled paychecks. With one abiding exception,[67] the Respondent does not contend that the cards were not authentic, that each card was signed on or before June 14, 1979, as part of the Union's continuing campaign was established in each case by the employees concerned, by witnesses who had seen the cards signed or by other evidence in the record.

In these circumstances, I am satisfied that the cards received over objection are valid designations, although the employees concerned did not themselves testify. As the Union had-53 valid designations as of June 14, 1979, in the unit then consisting of 101 employees, the Union was the majority representative of the Respondent's employees on that date.[68]

3. The refusal to bargain

The General Counsel contends that in determining whether the Respondent's unlawful activities so undermined the Union's majority strength and impeded the election process as to warrant the issuance of a bargaining order, the Respondent's entire pattern of unlawful conduct must be considered, from the start of the Union's campaign in June 1978, until the time of the representation election on July 20, 1979. The Respondent, in turn, argues in effect that its questioned conduct was not severe or pervasive, that most of its activities considered unlawful occurred before the Union acquired its claimed majority, sometimes well before, and that such conduct did not prevent the Union from gaining majority status or, thereafter, contribute to its loss. In fact, the Respondent argues that the only controversial incidents to occur after June 14, 1979, took place during the July 11 meeting between Minasy and the employees who had been selected because of their observed union activities and influence within the shop, during the series of meetings between Minasy and small groups of employees in the days before the election, and during the July 13 conversation between Christofides and DePietro.

In *N.L.R.B.* v. *Gissel Packing Co., Inc.*,[69] the Supreme Court stated the general principles applicable to the issuance of bargaining orders. The Court affirmed the Board's authority to issue a bargaining order not only in "exceptional cases" marked by "outrageous and pervasive" unfair labor practices which eliminate the possibility of holding a fair election, but also in "less extraordinary cases marked by less pervasive practices" where there is a showing at one point that the union had a card majority, and the Board concludes that the extensiveness of the unfair labor practices "have the tendency to undermine majority strength and impede the election process."[70] As noted by Administrative Law Judge Pannier in his Board-approved decision in *Ultra-Sonic De-Burring, Inc. of Texas*:[71]

> [T]he Board has not been reluctant to issue bargaining orders based upon unfair labor practices occurring prior to attainment of majority. See *Bookland, Inc.*, 221 NLRB 35 (1975). The fact that majority support is retained despite unlawful discharges does not serve to shield employers from issuance of remedial bargaining orders. See *John C. Carey Milling Company*, 218 NLRB 916 (1975); *The Great Atlantic & Pacific Tea Co., supra* [*Birmingham Division*, 210 NLRB 593 (1974).] In essence, Respondent is basing its argument upon subjective considerations, while the test for determining whether a bargaining order should issue is an objective one. See *Broadmoor Lumber Company*, 227 NLRB 1123, fn. 16 (1977), and cases cited therein. Therefore, I find that the timing of Respondent's unfair labor practices does not nullify the need for issuance of a bargaining order to remedy them.

Again, in *Rapid Manufacturing Company*,[72] the Board noted that while it normally relies on conduct which occurred during the "critical period" preceding an election[73] in determining whether an election should be set aside, the Board normally bases its *Gissel* bargaining orders on all unfair labor practices committed by a particular respondent.

Record evidence in this case establishes that the Respondent attempted to defeat the Union's organizational campaign from its very inception to its conclusion. On June 16, 1978, the day Sapenoff first approached the Respondent's employees, Supervisor DePietro interrogated employee Patrick Bellucci as to whether he had signed a union card immediately after watching him in conversation with Union Organizer Sapenoff, and, within a week, Bellucci, a satisfactory employee, was unlawfully terminated. The first meeting of the Respondent's employees scheduled by the Union for June 28, away from the Respondent's premises, was broken up by Plant Manager

[67] In agreement with the Respondent, I find that the signature on the authorization card purportedly signed by Teresa Rodriguez differs significantly from the provided standards and, accordingly, conclude that this card is not a valid designation.

[68] *Continental Distilling Sales Company, a Division of Publicker Industries, Inc.*, 145 NLRB 820, 839-840, fn. 35 (1964), enfd. in part 348 F.2d 246 (7th Cir. 1965); *Irving Taitel, et al., d/b/a I. Taitel and Son*, 119 NLRB 910, 912 (1957), enfd. 261 F.2d 1 (7th Cir. 1958), cert. denied 359 U.S. 944 (1959).

[69] 395 U.S. 575 (1969).

[70] *Gissel, supra* at 614; *Hitchiner Manufacturing Company*, 243 NLRB 927 (1979).

[71] 233 NLRB 1060, 1068 (1977). In *Ultra-Sonic De-Burring*, as here, the Respondent argued that since as most of the unfair labor practices predated the signing of most of the union cards, its activities could not have dissipated the Union's majority.

[72] 239 NLRB 465, 466, fn. 7 (1978).

[73] See fn. 2, *supra*.

Montalbano, who refused to leave when requested, and who remained in the vicinity until the meeting lost its momentum. The impact of Montalbano's tactic was apparent at the next off-premises union meeting on July 13, 1978, when only 2 employees showed up, compared to the approximately 15 who came to the first meeting.

In early March 1979, the Respondent unlawfully granted new benefits in the form of paid sick leave, bereavement leave and jury duty, and a new added annual holiday.

Shortly after the Union requested recognition and filed its concurrent petition for an election on May 1, the Respondent installed a guarded fence around its rear employee parking lot, where much union activity had previously occurred, and used this fence to enforce a discriminatory no-access rule, excluding union organizers while a nonemployee vendor, the food truck, was allowed continued daily entry. Less than 10 days before the July 20 election, employees who supported the Union were singled out for a meeting with the Respondent's president in his office and told that they were there because of their known union sympathies and influence in the shop. Thereafter, in a series of meetings with groups of employees in the days immediately before the election, Minasy repeatedly referred to the economic benefits that earlier had been unlawfully afforded and blamed the Union's continuing campaign that other new improvements could not be implemented. Finally, also shortly before the election, DePietro ended the Respondent's cycle as it had begun, by interrogating another employee about his union activities—this time, Christofides.

Although the Union's campaign has been long, and the interrogation and discharge of Bellucci and Montalbano's surveillance of the Union's first meeting may seem distant from the June 1979 majority date, the termination of Bellucci, a leading union proponent, and Montalbano's activities at the meeting clearly tended to stall the Union's drive and to contribute to its duration, as did the Respondent's later unlawful conduct.

Under these circumstances, the likelihood that a fair election could be insured by use of traditional Board remedies is sufficiently remote to warrant a finding that the desires of the employees, once expressed through authorization cards, would be better protected through issuance of a bargaining order. As the Respondent's conduct has created an atmosphere in which a free and fair election cannot take place, it is clear from the above authority that the fact that many of the unfair labor practices found herein predate the Union's majority does not preclude the issuance of an otherwise appropriate and necessary bargaining order.

Accordingly, I find that the duty to bargain commenced on June 14, 1979, the date the Union attained majority status.[74]

[74] *Hitchiner Manufacturing Company, supra* at fn. 6 (1979). Although the Union did not yet have a majority on May 1, 1979, when it requested recognition and bargaining and did not thereafter specifically renew this request upon attaining majority, in *Ludwig Fish & Produce, Inc.*, 220 NLRB 1086 (1975), the Board noted that there was nothing in *Gissel, supra*, which conditioned the bargaining order remedy upon a demand for bargaining. Therefore, noting the Respondent's negative reaction to the May 1 bargaining request, its later conduct, and the institution and pendency of the Union's election petition, it is concluded that a subsequent demand for recognition would have been futile and that the Union's bargaining demand was continual.

F. *The Objections to the Election in Case 29-RC-4562*

The Union's objections to the election closely parallel certain of the unfair labor practice allegations set forth in the consolidated complaints and found violative herein, including the Respondent's construction of a fence enclosing the employee's parking lot and its use to enforce a discriminatory no-access rule, the express singling out of employees known to be union adherents to meet with Minasy in the president's office, and coercive interrogation of an employee concerning his union sympathies and activities.

In view of the bargaining order found applicable herein, it is recommended that the election in Case 29-RC-4562 be set aside and that the said representation proceeding be dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by:

(a) Coercively interrogating employees about their union activities and sympathies.

(b) Engaging in and creating the impression that it was engaging in the surveillance of the union activities of its employees.

(c) Disparately enforcing a rule, practice, or policy which restricted or forbade access to its employee parking lot by nonemployees.

(d) Granting new economic benefits to its employees during the Union's organizational campaign to discourage employee support for the Union.

(e) Blaming the Union and its organizing drive during the critical period before the election that further economic benefits could not be afforded to employees.

(f) Coercively singling out employees who are known union adherents, in the critical period before the election, to meet with management in a locus of authority.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging Patrick Bellucci, Jr., because he engaged in union activities.

5. The following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production, maintenance, shipping, receiving, stock and quality control employees, inspectors, testers and material handlers employed by the Respondent at its 100 Tec Street and 33 Tec Street, Hicksville, New York, locations, excluding all office clerical employees, field service representatives, salesmen, professional employees, guards, watchmen and supervisors, as defined in the Act.

6. On or about June 14, 1979, and at all times material thereafter, the Union herein represented a majority of the employees in the above-described appropriate unit, and has been the exclusive representative of all said employees for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

7. By refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the above-described unit since on or about June 14, 1979, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. The Respondent's unlawful conduct interfered with the representation election held on July 20, 1979.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As I have found that the Respondent unlawfully discharged Patrick Bellucci, Jr., because he engaged in union activities, I shall recommend that the Respondent be ordered to offer him immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges, and to make him whole for any loss of earnings suffered as a result of the discrimination by payment of a sum equal to that which he would have earned, absent the discrimination, with backpay and interest computed in accordance with *F. W. Woolworth Company*,[75] and *Florida Steel Corporation*.[76]

For the reasons set forth above, I shall recommend that the Respondent be ordered to recognize and, upon request, to bargain collectively with the Union as the exclusive bargaining representative of the employees in the above-described unit. As a bargaining order has been found appropriate, it would be consistent that the election in Case 29-RC-4562 be set aside and that the petition in that matter be dismissed.[77]

[75] 90 NLRB 289 (1950).

[76] 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[77] As the unfair labor practices committed by the Respondent are serious, and include unlawful discharge, I shall recommend that it cease and desist therefrom and any other manner from interfering with the rights of employees guaranteed under Sec. 7 of the Act. *Magnesium Casting Company, Inc.*, *supra* at fn. 3.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[78]

The Respondent, Knogo Corporation, Hicksville, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees about their union activities and sympathies.

(b) Engaging in, or giving employees the impression that it is engaging in, surveillance of their activities or sympathies in support of Local 810, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

(c) Disparately enforcing a rule, practice, or policy restricting or forbidding access to its premises by nonemployees.

(d) Granting new economic benefits to its employees during the Union's organizational campaign to discourage employee support for the Union.

(e) Blaming the Union and its organizing drive that additional economic benefits could not be afforded to employees.

(f) Coercively singling out employees who are known union adherents to meet with management.

(g) Discharging or otherwise discriminating against employees because of their union activities and sympathies.

(h) Refusing to recognize and, upon request, bargain with the above-named Union as the exclusive bargaining representative of its employees in the following unit:

All production, maintenance, shipping, receiving, stock and quality control employees, inspectors, testers and material handlers employed by the Respondent at its 100 Tec Street and 33 Tec Street, Hicksville, New York, locations, excluding all office clerical employees, field service representatives, salesmen, professional employees, guards, watchmen and supervisors, as defined in the Act.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Offer Patrick Bellucci, Jr., full and immediate reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay suffered as a result of the discrimination against him in the manner set forth hereinabove in the section entitled "The Remedy."

(b) Recognize and, upon request, bargain with the above-named labor organization as the exclusive collec-

[78] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order shall, as provided by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purpose.

tive-bargaining representative of its employees in the bargaining unit set forth above with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Post at its Hicksville, New York, locations copies of the attached notice, marked "Appendix."[79] Copies of such notice, to be furnished by the Regional Director for Region 29 of the Board, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and shall be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director of Region 29, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the consolidated complaints herein be dismissed insofar as they allege violations of the Act not specifically found herein.

IT IS FURTHER ORDERED that the election in Case 29-RC-4562 hereby is set aside and that the petition in that matter is dismissed.

[79] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT coercively interrogate you about your activities and sympathies for Local 810, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT spy on what you do in connection with the above-named Union, or any other labor organization, and WE WILL NOT say or do anything to cause you to believe that we have spied or that we are spying on what you do in connection with the above-named Union.

WE WILL NOT disparately enforce any rule, practice, or policy that restricts or forbids access to our premises by nonemployees.

WE WILL NOT in the future give you improved job benefits or anything else of value to induce you to stop helping, stop supporting, or to not vote for the above-named Union, or any other labor organization.

WE WILL NOT tell you that the above-named Union and its organizational campaign is responsible for your not receiving further economic benefits to induce you to stop helping or otherwise supporting the Union.

WE WILL NOT coercively single you out to meet with members of management because you have supported or were active on behalf of the above-named Union.

WE WILL NOT discharge or otherwise discriminate against you because of your union activities and sympathies.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you in Section 7 of the National Labor Relations Act.

WE WILL offer Patrick Bellucci, Jr., immediate and full reinstatement to his former position, or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole, with interest, for any loss of earnings he may have suffered because of our discriminatory conduct against him.

WE WILL recognize and, upon request, bargain with the above-named Union as the exclusive representative of our employees in the appropriate unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

All production, maintenance, shipping, receiving, stock and quality control employees, inspectors, testers and material handlers employed by Knogo Corporation at our facilities at 100 Tec Street and 33 Tec Street, Hicksville, New York, excluding all office clerical employees, field service representatives, salesmen, professional employees, guards, watchmen and supervisors, as defined in the Act.

KNOGO CORPORATION